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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PAUL G. THOMASSON,

Petitioner,

v.

WILLIAM J. PERRY, Secretary of Defense, and
JOHN H. DALTON, Secretary of the Navy,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, either on its face or as applied to petitioner, the government's "Don't Tell" policy, which restricts the freedom of homosexual service members to state their sexual orientation, constitutes an impermissibly overbroad and content-based restriction of speech in violation of the First Amendment.

2. Whether, either on its face or as applied to petitioner, the government's policy on military service by homosexuals, which purports to further the military's interest in "unit cohesion," gives effect to invidious prejudice and illegitimately and irrationally discriminates against homosexual service members who state their sexual orientation in violation of the equal protection guarantee of the Fifth Amendment.

3. Whether, either on its face or as applied to petitioner, the government's policy on military service by homosexuals imposes an improper or irrebuttable presumption of misconduct against homosexual service members who disclose their sexual orientation, in violation of the equal protection and due process guarantees of the Fifth Amendment and the Administrative Procedure Act.

4. Whether the court of appeals erred in upholding petitioner's discharge from the Navy when a majority of the court concluded that the regulations that were applied to petitioner are unlawful.

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Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Paul G. Thomasson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-85a) is reported at 80 F.3d 915. The opinion of the district court (App., 86a-110a) is reported at 895 F. Supp. 820. The findings and recommendation of the Board of Inquiry (App., 114a-15a) and the final decision of Respondent Dalton (App., 111a-13a) are not reported.

JURISDICTION

The judgment of the court of appeals, which decided on its own motion to hear the case *en banc* before the original panel rendered a decision (App., 116a-17a), was entered on April 5, 1996 (App., 1a-85a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution (App., 118a); the relevant provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (App., 119a); Section 571 of the National Defense Authorization Act of 1994, 10 U.S.C. § 654 (App., 120a-25a); and Department of Defense ("DoD") Directive No. 1332.30 (App., 126a-60a) are set forth in the appendix.

STATEMENT

This case challenges the constitutionality, both on its face and as it has been applied to petitioner, of the federal government's recently codified policy regarding military service by homosexual citizens—a policy known colloquially as "Don't Ask, Don't Tell, Don't Pursue."

A. The Policy

On November 30, 1993, with the prior support and approval of the President, Congress enacted the National Defense Authorization Act of 1994 (the "Act"), which codified the "Don't Ask, Don't Tell, Don't Pursue" policy. 10 U.S.C. § 654 (App., 120a-25a).

Under the Act, a homosexual orientation, in and of itself, is not a bar either to induction into the armed forces or to continued military service. *Id.*, § 654(b)-(c) (App., 122a-23a). On the other hand, a service member's statement that he or she is a homosexual is, without more, a sufficient basis for discharge. *Id.*, § 654(b)(2) (App., 122a). A service member who states that he or she is a homosexual can avoid discharge only if he or she rebuts a statutory presumption, which requires proof of a negative proposition: the service member must "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.*

The Act does not define the term "propensity," but it defines a "homosexual act" in broad language to mean:

> (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
>
> (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

Id., § 654(f)(3) (App., 124a).

On December 22, 1993, the Department of Defense ("DoD") issued two new directives to give effect to the Act.

See DoD Dir. No. 1332.30 (App., 126a-60a).[1/] These directives took effect on February 28, 1994. App., 130a. Like the Act, the new directives do not regard sexual orientation as a disqualification for military service; in fact, they expressly provide that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct." DoD Dir. No. 1332.30, Enc. 2, ¶ C (App., 135a).

Notably, however, the new directives define certain "statements" to be "homosexual conduct." *See* DoD Dir. No. 1332.30, Enc. 2, ¶ C (App., 135a) ("*[h]omosexual conduct includes . . . a statement* by a member that demonstrates a propensity or intent to engage in homosexual acts . . .") (emphasis added). Specifically, under DoD Directive No. 1332.30, the statement "I am gay" constitutes actionable "homosexual conduct"—an all-encompassing term that is defined to include both "statements" that one is homosexual and "homosexual acts." *Id.* (App., 136a-37a). Thus, notwithstanding their assurance that a homosexual orientation is not a bar to continued military service, the directives authorize the discharge of a service member solely on the basis of his or her statement that he or she is a homosexual—a mere expression of that orientation—without any showing of any forbidden conduct of any kind. *Id.* (App., 136a-37a).

In addition, DoD Directive No. 1332.30 defines the term "propensity," which is left undefined in the Act, in the following terms:

[1/] DoD Directive No. 1332.30, which was applied to Petitioner, governs the administrative separation of regular commissioned officers. DoD Directive No. 1332.14 governs the administrative separation of enlisted personnel. The two directives are identical in all material respects.

> Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

DoD Dir. No. 1332.30, Enc. 1, ¶ 13 (App., 132a). Finally, the Directive specifies factors to be considered "[i]n determining whether an officer [who states that he or she is a homosexual] has successfully rebutted the [statutory] presumption," including, without limitation, evidence regarding: "(1) [w]hether the officer has engaged in homosexual acts; (2) [t]he officer's credibility; (3) [t]estimony from others about the officer's past conduct, character, and credibility; (4) [t]he nature and circumstances of the officer's statement; and (5) [a]ny other evidence relevant to whether the officer is likely to engage in homosexual acts." *Id.*, Enc. 2, ¶ C.1.b(1)-(5) (App., 137a).[2/]

[2/] As explained by DoD, the new policy differs from DoD's prior, uncodified policy in three principal respects, which roughly correspond to the three respective phrases by which the policy has come to be known: "Don't Ask, Don't Tell, Don't Pursue."

First, "[a]ccession policy has been revised so that no applicant [for military service] will be asked about his or her sexual orientation as part of the accession process. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct." Office of the Assistant Secretary of Defense for Public Affairs, *News Release: Secretary Aspin Releases New Regulations on Homosexual Conduct in the Armed Forces*, at 1 (Dec. 22, 1993), *reprinted in* Rec. as Pl. Ex. T5G, at 1810. Second, "[s]eparation policy has been revised to emphasize that DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation." *Id.* Third, neither any criminal investigation nor any personnel security inquiry or investigation will be conducted by DoD "solely to determine a servicemember's sexual orientation[,]" and "[i]nvestigations [regarding sexual misconduct] will be

(continued...)

B. The Facts

On March 2, 1994, petitioner, who was then a commissioned lieutenant on active duty in the United States Navy, delivered a letter to four Navy admirals for whom he had served to inform them, as a statement of principle and personal integrity, that "I am gay." C.A. App., 60-61. Solely on the basis of this statement, and notwithstanding his exemplary record, the Navy commenced involuntary separation proceedings against him, and on June 15, 1995, petitioner was discharged from the service.

Until his discharge, petitioner had served in the Navy for nearly 10 years. Throughout this period, which included both operational and staff assignments both in the United States and overseas, petitioner distinguished himself as an outstanding officer and aviator. *See generally* C.A. App., 345-58. He consistently received the highest possible evaluations and commendations from his commanding officers and superiors, who have included some of the nation's highest-ranking military officials, and he was considered a leading candidate to rise to the rank of admiral. *See id.*

The views of Rear Admiral Lee F. Gunn are typical. Admiral Gunn, who was one of the recipients of petitioner's March 1994 letter, was the senior Naval officer responsible for implementing the "Don't Ask, Don't Tell" policy at the time of its formulation. He was also one of four admirals for whom petitioner served as a personal aide. In his estimation:

[2/](...continued)
conducted in an evenhanded manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct." *Id.* at 1810a.

> Lieutenant Thomasson is . . . a true "front runner" who should be groomed for the most senior leadership in tomorrow's Navy. In the meantime, *if you are in your right mind, you want Paul Thomasson working for you*, whether the environment is staff or operational. . . . Lt. Thomasson has *genuine flag potential*.

C.A. App., 234 (emphasis in original); *see also id.*, 248-49 (Gunn declaration).

Rear Admiral Albert H. Konetzni, another recipient of petitioner's letter and the senior Naval officer who succeeded Admiral Gunn in overseeing the policy, has similarly described petitioner's performance. *See id.*, 347, 353-54. Petitioner began serving for Admiral Konetzni on February 1, 1994, and he continued to serve the Admiral until his discharge 16½ months later. In a fitness report submitted nearly one year after petitioner first stated that he is gay, Admiral Konetzni wrote that petitioner "is one of the finest junior officers I have ever had the pleasure to serve with" and observed that he "[c]ommands the respect of his subordinates and seniors alike through honesty, integrity, and forthright communication." C.A. App., 382. In a final fitness report submitted on the day of petitioner's discharge, the Admiral again described petitioner's performance as "absolutely outstanding." C.A. Br. for App'nt, Addendum E.[3/]

C. Proceedings Below

The Navy commenced proceedings against petitioner on

[3/] The record is replete with evidence of the high regard in which petitioner was held, by his superiors and subordinates alike, both before and after he first stated that he is gay. App., 91a (district court); *id.*, 6a-7a (court of appeals majority); *id.*, 74a-75a & n.4 (court of appeals dissent); C.A. App., 348-69, 381-82, 406-17.

March 9, 1994, solely as a result of his statement of his sexual orientation, as expressed in his March 2, 1994 letter. *See* C.A. App., 58-59. Ten weeks later, a three-member Board of Inquiry convened to hear the Navy's case. *Id.*, 342.

As the district court later found, "during its phase of the [Board's] proceedings, the Navy acknowledged that Lt. Thomasson had attained an 'enviable' service record" and "also acknowledged that there was no evidence that Lt. Thomasson had engaged in any 'homosexual acts.'" App., 91a (citing administrative record). Instead, the Navy based its case on the proposition that petitioner's "statement" that he is gay was, in and of itself, forbidden "homosexual conduct" within the meaning of the policy. *See* C.A. App., 343 (citing administrative record). In response, as the district court later observed, "Lt. Thomasson submitted evidence of his service record, expert testimony regarding the meaning and nature of both homosexuality and the military's policy on homosexuality, and written and live testimony from 15 witnesses with whom he had served and worked over the course of his Navy career. The Navy did not introduce any rebuttal evidence or dispute the substance of any of Lt. Thomasson's evidence." App., 91a.[4/] The Navy witnesses who testified spanned a broad spectrum of ranks, personal backgrounds, and military experiences and uniformly

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[4/] Petitioner also explained to the Board, in a personal statement, why he wrote his letter and what he intended to convey. First, as he explained, he felt obligated as a matter of principle to inform his commanding officers and colleagues of his sexual orientation, so that those who knew him best and worked with him might know this basic aspect of who he is, and so that he himself might stop publicly having to pretend that he is a heterosexual. Second, he thought that the new policy would perpetuate false stereotypes about gays and lesbians, and he believed that he might help to dispel such stereotypes by virtue of his own record, position, and conduct. *See* C.A. App., 235-41; *see also id.* 400.

indicated support and respect for petitioner and a continued willingness to serve with him.

On this record, the Board of Inquiry unanimously recommended that petitioner be honorably discharged. App., 114a-15a. The Board concluded that petitioner's statement of his sexual orientation fit the policy's prohibitory definition: it indicated that he "engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts." Specifically, the Board found "by a preponderance of the evidence" that petitioner "has failed to demonstrate acceptable qualities of leadership . . . as evidenced by statements that he made *which are conduct* within the meaning of [the policy] and the presumption of homosexual conduct thereby raised is not rebutted." *Id.* (emphasis added).

Thereafter, a Board of Review unanimously concurred, without comment, in the Board of Inquiry's recommendation (C.A. App., 295), and on January 13, 1995, Respondent Dalton formally accepted the recommendation of the Chief of Naval Personnel that petitioner be discharged (App., 111a-13a).

On February 27, 1995, petitioner commenced this action with an accompanying motion for immediate relief. The district court (E.D. Va. Hilton, J.) initially enjoined respondents from discharging petitioner (C.A. App., 330), but on June 8, 1995, after expedited consideration of the merits, the court granted summary judgment for respondents on all claims. App., 110a.

In its opinion, the district court declined to enter specific findings of fact or to address the evidentiary record. *See* App., 86a-110a. It thus effectively treated the case as a purely facial challenge. In addressing petitioner's claims, the court first rejected his First Amendment arguments, holding

that the policy did not impermissibly burden speech but rather authorized the permissible "evidentiary use" of a statement of sexual orientation. App., 92a-97a.

The court then addressed petitioner's equal protection claims. Here, the court professed a fundamental "lack of competence . . . to second-guess decisions made by Congress in the military context," and it therefore accepted at face value the justifications proffered by the government to defend the policy. *Id.*, 101a. Accordingly, without reference to the record (and without regard to the fact that the Act expressly allows undeclared homosexuals to serve), the court held that "[t]he policy . . . is not based on prejudice but on the military's need to address the legitimate concern that service by homosexuals in the military will adversely impact unit cohesion and military readiness." *Id.*, 105a. The court further held that the policy is rationally designed to serve this purpose. *Id.*, 105a-08a. Finally, the court rejected petitioner's due process and APA claims. *Id.* 108a-10a.

In reaching its decision, the court declined to address the recent decision in *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995), *appeal pending*, No. 95-6111 (2d Cir.), the only other case at the time to have addressed the Act. Two months before the district court's ruling here, the *Able* court held the Act facially unconstitutional for many of the same reasons advanced by petitioner, and it permanently enjoined the government from discharging the six *Able* plaintiffs.

On June 12, 1995, the Navy ordered that petitioner be separated, and three days later, after unsuccessfully seeking an injunction pending appeal, petitioner was officially discharged. Although it denied interim relief, the court of appeals (Luttig, Michael, Motz, JJ.) ordered expedited briefing of the merits, and on September 12, 1995, the court heard oral argument. Eight days later, the court announced that it had voted, *sua*

sponte, to rehear the case *en banc* (App., 116a-17a), and on December 5, 1995, the parties reargued the case before the full court. On April 5, 1996, the court issued its decision. App., 1a-85a. By a vote of 9-4, it affirmed the judgment of the district court in a decision that included four separate opinions. *Id.*[5/]

Writing for the majority, Chief Judge Wilkinson rested the court's decision on the perceived need for plenary judicial deference to the shared judgment of "the coordinate branches of our government" in military affairs. *Id.*, 13a. The court thus declined "to upset . . . [the] carefully crafted national political compromise" embodied in the Act and refused "to award [to petitioner] by judicial decree what was not achievable by political consensus." *Id.*, 8a, 12a.[6/]

Although it grounded its decision on notions of judicial deference, the court also addressed and rejected several specific arguments that petitioner had advanced in support of his claims. First, the court rejected his assertion that the policy burdens a fundamental right (*i.e.*, the freedom of speech) and rests on an inherently suspect classification (*i.e.*,

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[5/] The majority opinion was authored by Chief Judge Wilkinson, who was joined by Judges Russell, Widener, Murnaghan, Wilkins, Niemeyer, Hamilton, Luttig, and Williams. App., 3a-36a. Judge Murnaghan wrote a brief separate concurrence. *Id.*, 36a. Judge Luttig wrote an extensive separate concurrence in which Judges Russell, Widener, Wilkins, Hamilton, and Williams joined. *Id.*, 36a-71a. Judge Hall authored the dissent, in which Judges Ervin, Michael, and Motz joined. *Id.*, 71a-85a.

[6/] In a separate, one-paragraph concurrence, Judge Murnaghan concluded that the majority's "extended discussion of judicial deference to the military is unnecessary." App., 36a. In his view, the case simply "concerns a rebuttable presumption which Thomasson did not rebut." *Id.* Judge Murnaghan expressed no opinion on the threshold issue of the legitimacy of the policy's imposition of that presumption.

sexual orientation), thereby warranting heightened scrutiny on two separate grounds. *Id.*, 22a-23a. The court found instead that the policy targets homosexual conduct, not speech or sexual orientation, and in so doing, only requires rational-basis review. *Id.*, 23a.

Applying such review, the court held that the policy does not violate the guarantee of equal protection. In this regard, like the district court, the court of appeals accepted the government's proffered "unit cohesion" rationale at face value, declining to inquire whether the record shows that the policy's rationale is based, in fact, on illegitimate and invidious prejudice. *Id.*, 24a-26a.

The court similarly concluded that the policy operates in a rational manner. Here, the court rebuffed three central arguments advanced by petitioner. First, it rejected petitioner's contention that it is irrational to presume, on the basis of his statement and in light of his service record, that he will violate Navy regulations and engage in forbidden conduct. *Id.*, 26a-28a. Second, the court likewise rebuffed petitioner's argument that it is irrational to treat declared homosexuals differently from undeclared homosexuals solely on the basis of the formers' speech. *Id.*, 28a. Third, the court denied (and largely declined to address) petitioner's contention that the policy impermissibly discriminates between heterosexuals and homosexuals in its expansive and unevenhanded definition and treatment of "homosexual conduct" and "homosexual acts." *Id.*, 24a-28a.[7/]

[7/] By defining "homosexual conduct" to include mere statements of a homosexual orientation, the policy restrains the speech of homosexuals but imposes no comparable restraint on the speech of heterosexuals. *See* DoD Dir. No. 1332.30, Enc. 2, ¶ C (App., 135a-37a). Under the policy, a heterosexual may state "I engage in oral sex"—an admission of illegal

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Turning to petitioner's First Amendment challenge, the court similarly held, for many of the same reasons, that the district court's ruling was correct. Here, the court concluded that petitioner "misinterprets the basic purpose of the policy" because "[t]he statute does not target speech declaring homosexuality" but rather "targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence." *Id.*, 29a. In so ruling, the court rejected petitioner's contrary argument that because the policy expressly states that a homosexual orientation is not a bar to continued military service, a mere verbal acknowledgment of that orientation necessarily lacks meaningful evidentiary value, and the regulation of such statements constitutes prohibited overbreadth. *Id.*, 30a-31a. The court likewise rejected petitioner's claim that the policy impermissibly restricts core First Amendment speech on the basis that others may find that speech offensive. *Id.*, 32a-34a.

Finally, like the district court, the court of appeals summarily rejected petitioner's due process and APA claims, holding that the presumption that he engages in forbidden conduct, on the basis of his statement of his sexual orientation, was neither impermissible nor irrebuttable, and that the policy was properly applied. *Id.*, 35a-36a.

Despite their subscription to the majority opinion, six members of the court, who expressly joined in that opinion,

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[7]/(...continued)
sodomy (*see* 10 U.S.C. § 925)—without any administrative consequences, but a homosexual cannot freely state "I am gay." *See* 10 U.S.C. § 654(b)(2). Likewise, the policy defines the "homosexual acts" that it proscribes and purports to prevent to include not just sodomy, which military law otherwise proscribes for heterosexuals and homosexuals alike (*see* 10 U.S.C. § 925), but potentially all affectionate "bodily contact" between homosexuals and homosexuals alone. *See* 10 U.S.C. § 654(f)(3).

also joined in Judge Luttig's separate concurrence, which starkly contrasts with and contradicts the majority's reasoning in two critical respects. First, while the majority rested its holding on the need for plenary judicial deference to "the military powers of [both] Congress and the President" (*id.*, 15a), the concurring group concluded that the court should not grant any such deference to the Executive Branch (*id.*, 36a-38a). In the opinion of these six judges, such deference is inappropriate here because the DoD directives conflict with the Act.

As Judge Luttig opined, the directives impermissibly "creat[e] a sanctuary for homosexuals within the military" by purporting to allow some known homosexuals to serve by rebutting the Act's presumption when, in fact, Congress plainly intended to bar all known homosexuals from service and never meant for the presumption to be rebuttable, absent proof that the speaker is not, in truth, a homosexual. *Id.*, 37a; *see generally id.*, 36a-71a. Thus, Judge Luttig (and the five judges who joined him) "would simply invalidate the Administration's regulation as in excess of its statutory authority" and "[t]hen, having done so, . . . would sustain the policy that was actually enacted into law as a permissible exercise of *Congress'* constitutional authority '[t]o make Rules for the Government and Regulation' of the military." *Id.*, 37a (citing U.S. Const. art. I, § 8, cl. 14) (emphasis added).[8/]

Second, while the majority upheld the policy on the ground advanced by respondents—*i.e.*, that the Act validly "targets homosexual acts and the propensity or intent to

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[8/] As we indicate below, because this case presents an "as applied" challenge, the conclusion of these six judges that the regulations are invalid—together with the conclusion of the four dissenters that the policy as a whole is unconstitutional—should have produced a 10-3 vote to reverse the district court, not a 9-4 vote to affirm.

engage in homosexual acts" and does not wrongfully burden speech or invidiously discriminate (*id.*, 29a)—the concurring group expressly repudiated this analysis. Rather, they agreed with petitioner:

> As Lt. Thomasson has steadfastly maintained, the statute, and the policy it embodies, is not at all conduct-based in the sense now argued by the Executive Branch, assertedly on behalf of the Congress. The statute requires the discharge of homosexual service members who merely say that they are homosexual or otherwise evidence their homosexuality, regardless of whether they have actually engaged in homosexual conduct or are likely to engage in any such conduct.

Id., 37a. As Judge Luttig explained, and as petitioner had argued, the apparent concern of policymakers was not, as respondents had insisted, with any perceived risk of "homosexual conduct" (in any common-sense meaning of that term), but rather with the perceived threat to "unit cohesion" that knowledge of the mere presence of an open homosexual might pose within a given unit. *Id.*, 39a-66a.

The concurring group thus expressly agreed with petitioner's core contention in this case: that respondents' persistent "'focus on conduct [is but] a lawyer-driven, pretextual afterthought.'" *Id.*, 47a (quoting C.A. Br. for App'nt). The concurring group, however, rejected the conclusion that petitioner deduced therefrom: that the policy is thus unconstitutional. Instead, they concluded that the policy, as properly understood, still withstands constitutional scrutiny because it is entirely permissible for the government to target homosexuals on the basis of their speech and sexual orientation *per se*. *Id.*, 66a-71a.

Finally, in a vigorous dissent by Judge Hall, four

members of the court argued that the policy as a whole, both on its face and particularly as applied to petitioner, is unconstitutional. *Id.*, 71a-85a. These judges rejected the majority's conclusion that there is no role for the courts to play in a constitutional challenge to a military policy of this sort. *Id.*, 71a-74a.

Like the concurring group, the dissenters rejected respondents' contention that the policy is "conduct-based" in any meaningful sense of that term; unlike the concurring group, however, they agreed with petitioner that the policy's suppression of speech is unconstitutional, under both the First and Fifth Amendments. *Id.*, 76a-85a. As Judge Hall opined, a restriction on speech by gay and lesbian service members—either on the basis of the perceived discomfort of heterosexuals or on the basis of a generalized presumption of misconduct by those homosexuals—is patently illegitimate and irrational. *Id.* The dissent thus concluded:

> Lt. Thomasson has been declared unfit to defend our country based on nothing more than an expression of his state of mind. The expression was not illegal, and the fact admitted is not a ground for discharge. His record of service is superb, and the Navy presented absolutely no evidence that he has violated any military rule of conduct in any way at any time, and absolutely no evidence that his exemplary record is not indicative of his likely future behavior.

Id., 84a.

REASONS FOR GRANTING THE PETITION

As the lower courts' treatment of the case demonstrates, this case presents questions of exceptional importance. At issue is whether the government may restrict the freedom of

an accomplished and dedicated military officer to utter a fundamental statement about who he is, solely on the basis of the anticipated discomfort of others, and thereby strip him of the ability to dispel the stereotypes and combat the prejudices from which he (and others similarly situated) routinely suffer.

Because it ultimately asks more questions than it answers, the decision of the court of appeals threatens to spawn considerable confusion and disarray. Already, the several lower courts that have addressed these questions have reached conflicting results, and the number of comparable legal challenges that are following in the wake of this case is proliferating at a rapid rate. Thus, this case presents a timely and important opportunity for guidance from this Court. Most importantly, though, the decision below is erroneous on matters of fundamental and far-reaching importance, and the decision stands in direct conflict with prior decisions of this Court, including, most recently, the Court's decision this Term in *Romer v. Evans*, No. 94-1039 (U.S. May 20, 1996).

I. This Case Presents Questions of Exceptional Importance, and the Decision of the Court of Appeals Is Erroneous.

A. The decision below has overriding constitutional importance. Under any level of constitutional scrutiny, it is erroneous and should not be permitted to stand.

1. As the dissent below observed (App., 76a-77a), this Court has recognized that a governmental policy based on invidious or irrational prejudice cannot serve a legitimate governmental purpose. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-50 (1985). As the Court has explained:

Private biases may be outside the reach of the law, but

> the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (citation omitted).

Recently, this Court had its first occasion to apply this principle in the context of sexual orientation. In *Romer v. Evans*, No. 94-1039 (U.S. May 20, 1996), the Court invalidated a state constitutional amendment, which had been adopted through a statewide referendum, on the ground that the text, surrounding circumstances, and operation of the amendment "raise[d] the inevitable inference that the disadvantage [that it] imposed [was] born of animosity toward the class of persons affected [*i.e.*, gays and lesbians]." Slip op. at 13. As the Court observed, "'[i]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Id.* (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original).

In this case, as in *Romer* (and as the dissent below noted), "[t]here is a great deal of evidence that the statute was motivated by a desire to accommodate prejudice against homosexuals." App., 77a. Indeed, respondents have admitted that homosexual service members, including petitioner in particular, can and do serve honorably and effectively in the armed forces and have further admitted, with considerable candor, that their policy is based on the perceived prejudices of heterosexuals. *Id.*, 77a-79a.

The majority below nowhere disputed these facts, and Judge Luttig expressly acknowledged in his concurrence that the Act's motivating concern is the anticipated adverse effect that knowledge of a homosexual's mere presence might have on "unit cohesion" (*id.*, 36a-71a). That is to say, the Act requires the discharge of a known homosexual, not because of any deficiencies in his abilities or conduct, but rather because of an expectation (which is devoid of empirical support) that some in the heterosexual majority will be so uncomfortable serving in his presence that they will be unable to perform their sworn duties. Bowing to "unit cohesion," as so defined, is constitutionally impermissible. *See Romer*, slip op. at 13-14.

2. As the dissent and other courts have observed, the policy also operates in an irrational and discriminatory fashion. It thereby fails the second half of the rational-basis test as well as the first.

For example, while the policy applies a presumption of misconduct to *declared* homosexuals, it applies no such presumption to *undeclared* homosexuals, who may serve in any duty station in the armed forces. *See* 10 U.S.C. § 654 (App., 120a-25a); *see also Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1334 (E.D. Cal. 1993) (finding this distinction "untenable").

Similarly, while the policy purports to target declared homosexuals out of a professed need for preventive safeguards against "homosexual acts," it will excuse the actual performance of such "homosexual acts" and permit the service member's retention, if the service member establishes that he or she is a heterosexual and thus, lacks the "propensity" to engage in such acts again. *See* 10 U.S.C. § 654(b)(1)(A)-(E)

(App., 122a).[2/]

Most peculiarly of all perhaps, while the policy expressly provides that the simple statement "I am gay" is, by itself, a "basis for discharge," it also expressly provides that each of the following is not a valid basis for discharge: "[1] going to a gay bar, [2] possessing or reading homosexual publications, [3] associating with known homosexuals, or [4] marching in a gay rights rally in civilian clothes." DoD Dir. No. 1332.30, Enc. 8, ¶¶ C.2.b, C.3.d (App., 157a-58a). According to the DoD Directive, "[s]uch activity, in and of itself, does not provide evidence of homosexual conduct." *Id.*, 158a. In fact, such activity does not even constitute "credible information" on which to initiate an inquiry into whether there is a "basis for discharge." *Id.* Thus, while homosexuals can serve and can even engage in a variety of expressive conduct that can make their sexual orientation clear to their unit mates, they cannot say "I am gay."

B. In all of these respects, the Act violates not only the Constitution's equal protection guarantees, but also its First Amendment guarantees. Although it is settled that First Amendment rights may be circumscribed in the military context, this Court previously has upheld military restrictions on speech only when they "protect a substantial Government interest unrelated to the suppression of free expression" and operate in an evenhanded and appropriately limited fashion. *Brown v. Glines*, 444 U.S. 348, 354 (1980); *see also Greer v. Spock*, 424 U.S. 828 (1976). Never has the Court suggested that the government may "enact discriminatory legislation

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[2/] This fact further demonstrates that the policy targets orientation and speech, not conduct. It also represents an important governmental admission: that "homosexuality" and "heterosexuality" transcend any sex act (*i.e.*, that sexual orientation is not a function of sexual conduct).

because it desires to insulate heterosexual servicemembers from statements that might excite their prejudices." *Able*, 880 F. Supp. at 980.

On the contrary, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338, 2346 (1995) (the expression of one's "identity as openly gay" and the effort "to show that there are such individuals in the community, and to support . . . like men and women" merit First Amendment protection); *Van Ooteghem v. Gray*, 628 F.2d 488, 490-93 (5th Cir. 1980) (gay public employee's statement of sexual orientation merited core First Amendment protection), *on reh'g en banc*, 654 F.2d 304 (1981), *cert. denied*, 455 U.S. 909 (1982).

Here, however, the government has suppressed petitioner's ability to state that he is gay, not because of any concern with that fact—indeed, respondents have expressly disclaimed that a homosexual orientation is "a bar to continued [military] service" (DoD Dir. No. 1332.30, Enc. 2, ¶ C (App., 135a))—but rather because of the expected adverse reaction that some heterosexual listeners may have to the mere knowledge and expression of that fact (*id.*, 120a-22a).

Nor can the policy be defended on the ground that it is a narrowly tailored preventative measure against forbidden conduct. At a minimum, the regulation of speech about sexual orientation on the basis of a generalized fear that it indicates a propensity to break rules regarding sexual conduct "constitutes prohibited overbreadth." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166-67 (4th Cir. 1976) (restriction of homosexuals' First Amendment activities on the

basis of their supposed propensity to engage in illegal conduct violated free speech and equal protection guarantees). The "[m]ere 'undifferentiated fear or apprehension' of illegal conduct is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation [of First Amendment activity] by the state." *Gay Students Org. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969)).

Indeed, the military already has comprehensive and evenhanded regulations of sexual conduct, and respondents have made no showing that those regulations are inadequate to the task. The new policy simply adds a discriminatory and overbroad, content-based restriction on speech. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (invalidating a very similarly structured law where, even assuming that the purported prophylactic purpose of the law served a substantial governmental interest, the statute could not "directly and materially advance its asserted interest because of the overall irrationality of the regulatory scheme" and further holding that the scheme was impermissibly overbroad); *see also 44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, slip op. at 22-28 (U.S. May 13, 1996) (plurality opinion) (stating that "government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends" in regulating conduct).

C. The court of appeals likewise erred in concluding that petitioner's First Amendment and equal protection challenges to the Act are only subject to rationality review. *See Rostker*, 453 U.S. at 69-71 (declining to articulate a different level of "scrutiny" for constitutional challenges that arise in the military context). Because the policy imposes a restraint on

the ability of gay and lesbian service members (but only gay and lesbian service members) to state their sexual orientation, it imposes a class-based and content-based restriction on speech. This Court has repeatedly held that laws that burden the exercise of First Amendment freedoms by particular individuals or groups are subject to strict scrutiny, whether or not such laws implicate a suspect classification. *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990).

In addition, as petitioner established through undisputed evidence, the Act also imposes a "suspect classification," as that term is understood under the tests traditionally recognized by this Court, because it disadvantages a discrete and insular minority and discriminates on the basis of an illegitimate consideration: sexual orientation. *See* C.A. App., 418-89; C.A. Br. for Appn't, 34-36.[10/]

D. Finally, the court of appeals also erred in failing to recognize that the Act, particularly as applied here, violates

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[10/] The court likewise erred in stating that its deference to the political branches must be plenary and that "the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President." (App., 15a (citing U.S. Const. art. III). This broad and novel conception of deference contradicts this Court's prior holdings. *See, e.g., United States v. Robel*, 389 U.S. 258, 264 (1967); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Rostker v. Goldberg*, 453 U.S. 57, 67, 70 (1981); *Weiss v. United States*, 114 S. Ct. 752, 769 (1994) (Ginsburg, J., concurring). Moreover, as the dissent below observed, such a rule of law would absolve any manner of invidious discrimination in the armed forces. *See* App., 80a-81a; *cf. Korematsu v. United States*, 323 U.S. 214, 219 (1944) (Court "could not reject the finding of military authorities" that wartime internment of Japanese Americans was proper); *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (deferring to legislative judgment to segregate races and holding that elected officials are "at liberty" to act to preserve "comfort" and "good order").

due process and the APA, and that the court's own logic required reversal.

1. On its face, the Board of Inquiry's one-page report demonstrates that the Act's supposedly rebuttable presumption was understood and applied in an irrebuttable manner: the Board found that petitioner's statement of his sexual orientation was, in and of itself, "homosexual conduct" within the meaning of the policy and that "the presumption of homosexual conduct thereby raised" was not rebutted. App., 114a. This reasoning is circular. The statement that triggered the presumption was taken as proof of the fact presumed. *See Able*, 880 F. Supp. at 976 (so holding); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-48 (1974) (irrebuttable presumption violated due process).

That the policy operates in this manner is not surprising, given that the policy burdens the challenged service member with the effectively impossible task of proving the absence of a "propensity." However, even if the presumption were rebuttable, it still violates due process to presume, on the basis of an undifferentiated, class-based expectation, that an exemplary military officer will violate military rules. *See id.; see also Romer*, slip op. at 10-13.[11/]

[11/] For example, it would be irrational for the Navy to presume that a sailor who states "I love life" will desert in the heat of battle because of the strength of his survival instinct. It likewise would be irrational for the Roman Catholic Church to presume that all priests will break their vows of celibacy because of their sexual urges. Rather, we must presume that people will obey the rules they live by, not violate them. *See Jacobson v. United States*, 503 U.S. 540, 551 (1992); *Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring). Otherwise, as the dissent noted, "rules are a vain exercise indeed." App., 82a. In any event, to the extent that the policy's presumption was rebuttable, petitioner's showing carried his burden. *See, e.g.*, C.A. App., 56-293. As the district court observed,

(continued...)

2. Equally disturbing is the court's conclusion that its own reasoning required an affirmance rather than a reversal. A majority of ten members of the court—the concurring group led by Judge Luttig and the four dissenters—expressly concluded that petitioner was discharged under invalid regulations. App., 36a-85a. Yet, rather than reverse, the court upheld petitioner's discharge. The court's holding thus amounts to an implicit determination that new and valid regulations, which do not now exist and without which the Act is inoperative, can lawfully be applied to petitioner retroactively, and that petitioner cannot possibly show or have any basis for retention under those non-existent regulations.[12/] That holding contradicts settled administrative law. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) (regulations typically cannot be applied retroactively); *id.* at 216-25 (Scalia, J., concurring) (same).

II. Legal Challenges to the Government's Policy Are Proliferating at a Rapid Rate, and the Lower Courts Have Reached Conflicting Results.

A. The first two district courts to have addressed the Act, including the district court in this case, have reached directly contrary results. *Compare Thomasson v. Perry*, 895 F. Supp. 820 (E.D. Va. 1995), *aff'd*, 80 F.3d 915 (4th Cir. 1996) (en banc), *with Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995), *appeal pending*, No. 95-6111 (2d Cir.).

[11/](...continued)
"[t]he Navy did not introduce any rebuttal evidence [to respond to petitioner's showing] or dispute the substance of any of [petitioner's] evidence." App., 91a.

[12/] The Act relies on express delegations to the Secretary of Defense and is not self-executing. *See* 10 U.S.C. §§ 654(b), (c), (e); 10 U.S.C. § 654 note (setting forth Pub. L. No. 103-160, §§ 571(b)-(d)) (App. 122a-25a).

In the present case, the district court upheld the policy, both on its face and as applied to petitioner, and it rebuffed legal challenges under the First and Fifth Amendments—a result that the court of appeals has now affirmed. *See* App., 1a-110a. By contrast, in *Able*, the district court held the policy unconstitutional on its face under the First and Fifth Amendments. *See Able*, 880 F. Supp. at 972-80. If *Able* is correct, it follows that the decisions of the lower courts in this case cannot be.[13/]

B. More recent decisions that have grappled with the policy have also produced conflicting results. *Compare Holmes v. California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996) (holding policy unconstitutional under First and Fifth Amendments), *appeal pending*, No. 96-15726 (9th Cir.); *Thorne v. United States Dep't of Defense*, 916 F. Supp. 1358, 1368, 1372 (E.D. Va. 1996) (holding case in abeyance for further briefing but concluding that the policy "is plainly a content-based restriction" on speech that "does not substantially further any of the proffered goals" and that likely violates the First Amendment), *with Richenberg v. Perry*, 909 F. Supp. 1303 (D. Neb. 1995) (upholding policy), *appeal pending*, No. 95-4181 (8th Cir.); *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995) (same), *appeal pending*, No. 95-2982 (4th Cir.); *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996) (same), *appeal pending*, No. 96-35314 (9th Cir.); *cf. Philips v. Perry*, 883 F. Supp. 539 (W.D. Wash. 1995) (upholding policy as applied to service member who admitted homosexual sexual conduct), *appeal pending*, No.

[13/] The government has appealed in *Able*, which was argued last January, and a decision from the Second Circuit should be forthcoming at any time. Apart from the fact that *Able* does not include an "as applied" challenge, the two cases also differ in that *Able* contains no due process or APA claim and raises threshold standing and exhaustion issues not presented here.

95-35293 (9th Cir.).[14/]

C. The conflict in the lower courts is even more acute when one considers decisions that have addressed challenges to the "old" policy, which was in effect, as a matter of Executive Order, before Congress enacted the "Don't Ask, Don't Tell" policy in late 1993. *See supra*, note 2 (summarizing the differences between the two policies). Not only do these cases conflict with one another, but in many respects, their holdings cannot be reconciled with those of the court of appeals here or of other courts that have addressed the new policy. *Compare Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (upholding facial constitutionality of old policy when narrowly construed, but invalidating the policy as applied to a service member who simply stated "'I am in fact gay'"); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994) (holding old policy unconstitutional under equal protection and substantive due process guarantees), *appeal pending*, Nos. 94-35600, 94-35674 (9th Cir.); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) (holding old policy unconstitutional under equal protection guarantee); *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (issuing preliminary injunction and finding likelihood of success on plaintiff's claim that old policy, as applied to one who simply stated that he is gay, "serves no legitimate governmental purpose"); *with Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (upholding old policy as rational where

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[14/] Although none of the foregoing cases has yet produced an appellate decision on the merits, one has produced a notable interlocutory appellate decision. *See Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995). In *Richenberg*, a divided court of appeals declined to issue an injunction pending the plaintiff's appeal. Chief Judge Arnold dissented and concluded that plaintiff is likely to prevail on appeal. *See id.* at 173-74. *Richenberg* was argued on the merits on April 8, 1996.

service member did not challenge the legitimacy of the policy's purpose), *vacating Steffan v. Perry*, 8 F.3d 57 (1993) (holding old policy facially unconstitutional under equal protection guarantee).[15/]

The conflict between the Ninth Circuit's decision in the *Meinhold* case and the decision of the court of appeals in this case is particularly acute. In *Meinhold*, the Ninth Circuit held that a discharge policy based on "the 'classification of *being* homosexual' clearly implicates equal protection [concerns]." 34 F.3d at 1477 (emphasis added). As the court explained:

> Although courts defer to the military's judgment about homosexual conduct . . . , at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference

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[15/] *See also Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.) (rejecting free speech challenge to old policy but remanding for further proceedings on equal protection claim), *cert. denied*, 506 U.S. 1020 (1992); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (rejecting free speech and equal protection challenges to old policy), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (rejecting equal protection and substantive due process challenges to old policy), *cert. denied*, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (rejecting equal protection and substantive due process challenges to old policy as applied to service member who admitted homosexual sexual conduct); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (rejecting equal protection, due process, and free speech challenges to old policy as applied to service member who was found to have fraudulently enlisted); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (rejecting procedural and substantive due process challenges to old policy as applied to service member who admitted homosexual sexual conduct), *cert. denied*, 452 U.S. 905 (1981); *cf. Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (holding that Army was equitably estopped from denying re-enlistment to homosexual soldier under old policy where Army knew for many years of soldier's sexual orientation), *cert. denied*, 498 U.S. 957 (1990).

> alone) will violate regulations whereas another class (identified by their preference) will not.

Id. at 1478. The *Meinhold* court held that it could avoid this "serious question" because the old policy could "reasonably be construed to reach only statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited." *Id.* at 1479. Subject to that judicially crafted, narrowing construction, the court upheld the old policy as facially constitutional, but it expressly invalidated the policy as applied to Meinhold who, like petitioner here, had simply stated, "'Yes, I am in fact gay.'" *Id.* at 1472, 1479 (quoting Meinhold's statement).

There is no dispute that the policy, as now codified, cannot support the limiting construction that the *Meinhold* court found necessary to avoid the policy's serious constitutional questions: the new policy expressly authorizes the discharge of a service member who simply says "I am gay." *See* 10 U.S.C. § 654(b)(2) (App., 122a); DoD Dir. No. 1332.30, Enc. 2, ¶ C.1.b (App., 136a-37a). It is likewise apparent that petitioner has been discharged for uttering the same statement that the Ninth Circuit held could not support Petty Officer Meinhold's discharge. Indeed, although respondents have attempted to defend the new policy as "conduct-based," 10 of the 13 judges of the court of appeals in this case have agreed with petitioner that, in fact, the policy is not conduct-based but rather targets speech and the mere presence of known homosexuals in the military's ranks. *See* pages 15-16, *supra*.

The present array of judicial decisions (under both the new and the old policies) demonstrates that there are widely conflicting authorities on the issues that this case presents. In addition, the number of comparable challenges that are wending through the administrative and judicial systems in the

wake of this case is both large and rapidly growing. *See, e.g.*, C.D. Osburn & M. Benecke, *Conduct Unbecoming: The Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue" Violations*, ii (1996) (stating that DoD "discharged 722 people under the [new] policy in fiscal year 1995—a four-year high, and a 21% increase over 1994 levels"). Accordingly, and in light of the *Romer* decision, the need for guidance from this Court is both pressing and great.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PAUL G. THOMASSON, Lieutenant, United States Navy,
Plaintiff-Appellant,

v.

WILLIAM J. PERRY, Secretary of Defense; JOHN H. DALTON, Secretary of the Navy,
Defendants-Appellees,

UNION OF AMERICAN HEBREW CONGREGATIONS; THE AMERICAN JEWISH CONGRESS; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; CENTER FOR WOMEN POLICY STUDIES; NATIONAL LESBIAN AND GAY LAW ASSOCIATION; GAY AND LESBIAN ADVOCATES AND DEFENDERS; AMERICAN CIVIL LIBERTIES UNION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; SERVICEMEMBERS LEGAL DEFENSE NETWORK; IAOMAI, INCORPORATED; FAMILY RESEARCH COUNCIL; IOTA LEGAL DEFENSE FUND,
Amici Curiae.

No. 95-2185

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-95-252-A)

Argued: December 5, 1995
Decided: April 5, 1996
[As Amended: April 17, 1996]

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ,
Circuit Judges, sitting en banc.

Affirmed by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judges Russell, Widener, Murnaghan, Wilkins, Niemeyer, Hamilton, Luttig, and Williams joined. Judge Murnaghan wrote a concurring opinion. Judge Luttig wrote a concurring opinion, in which Judges Russell, Widener, Wilkins, Hamilton, and Williams joined. Judge Hall wrote a dissenting opinion, in which Judges Ervin, Michael, and Motz joined.

COUNSEL

ARGUED: Allan Baron Moore, COVINGTON & BURLING, Washington, D.C., for Appellant. Edwin Smiley Kneedler, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Professor William Allen Woodruff, CAMPBELL UNIVERSITY SCHOOL OF LAW, Buies Creek, North Carolina, for Amicus Curiae FAMILY

RESEARCH COUNCIL. **ON BRIEF:** Mark H. Lynch, COVINGTON & BURLING, Washington, D.C., for Appellant. Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Anthony J. Steinmeyer, John C. Hoyle, F. Roy Hawkens, Edward Himmelfarb, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Lcdr. Edward S. White, Office of the Judge Advocate General, DEPARTMENT OF THE NAVY, Washington, D.C., for Appellees. Melissa Wells-Petry, Washington, D.C., for Amicus Curiae FAMILY RESEARCH COUNCIL. Chai R. Feldblum, Washington, D.C., for Amici Curiae UNION OF AMERICAN HEBREW CONGREGATIONS, et al. Beatrice Dohrn, Evan Wolfson, Jon W. Davidson, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, New York, New York; Ruth E. Harlow, Marc E. Elovitz, Matthew Coles, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Amici Curiae ACLU and LAMBDA LEGAL DEFENSE AND EDUCATION FUND. Jeffrey L. Bleich, MUNGER, TOLLES & OLSON, San Francisco, California; George C. Freeman, III, HUNTON & WILLIAMS, Richmond, Virginia, for Amicus Curiae SERVICEMEMBERS LEGAL DEFENSE NETWORK. Arthur C. Schulcz, Sr., Vienna, Virginia, for Amici Curiae IAOMAI and IOTA LEGAL DEFENSE FUND.

OPINION

WILKINSON, Chief Judge:

Former Navy Lieutenant Paul G. Thomasson challenges the constitutional validity of Section 571 of the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654, and the Department of Defense Directive that governs

homosexuality in the military, pursuant to which Thomasson received an honorable discharge from the Navy. We hold that the challenged statute is constitutional and that the discharge represented an appropriate exercise of military authority under the Act. In so holding, we affirm the judgment of the district court.

I.

A.

We shall set forth at the outset the relevant statutory framework in this case. In November, 1993, after lengthy deliberations, Congress approved and the President signed the National Defense Authorization Act, which codified a policy with respect to homosexuality and the armed forces. That policy came to be colloquially known as "Don't Ask, Don't Tell." In a series of findings that established the predicate for the policy, Congress declared that "[m]ilitary life is fundamentally different from civilian life," 10 U.S.C. § 654(a)(8), and that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion," 10 U.S.C. § 654(a)(6). Thus acknowledging that the demands of military life are distinctive, Congress further determined that "[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service." 10 U.S.C. § 654(a)(13). It also found that service members who demonstrate a "propensity or intent to engage in homosexual acts [ ] create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

In order to avoid this risk, the Act provides that members shall be separated from the armed services if one of three

findings is made: the service member engaged or attempted to engage in homosexual acts, 10 U.S.C. § 654(b)(1); the service member married or attempted to marry a person of the same sex, 10 U.S.C. § 654(b)(3); or the service member "stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2). It is pursuant to this last provision--the "statements" provision--that Thomasson was honorably discharged from the Navy.

In December, 1993, the Department of Defense announced Directives implementing the Act. Like the statute, the applicable Directive provides for separation if an officer "has engaged in . . . homosexual act[s]," "has married or attempted to marry" another of the same sex, or "has made a statement that he or she is a homosexual" and fails to demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30, Encl. 2,¶ C, at 2-1, 2-2. The Directive also provides that the officer's statement "creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so." DoD Dir. 1332.30, Encl. 2, ¶ C.1.b., at 2-2. The officer is informed of this presumption and afforded an opportunity to rebut it by presenting appropriate evidence. *Id.* Whether the presumption has been rebutted is determined by a variety of factors: whether the officer has engaged in homosexual acts; the officer's credibility; testimony from others about the officer's past conduct; the nature and circumstances of the officer's statement; and any other evidence relevant to whether the officer has a propensity or intent to engage in homosexual acts. *Id.*

B.

Paul G. Thomasson, the plaintiff in this case, rose to the rank of Lieutenant in his ten year Naval career. Thomasson's service record has been a commendable one. *Thomasson v. Perry*, 895 F. Supp. 820, 823, 829 (E.D. Va. 1995). Thomasson consistently received the highest possible performance ratings, he was one of a few junior officers selected for a Joint Chiefs of Staff Internship, and his supervisors, including senior Naval officers, praised his work. Rear Admiral Lee F. Gunn, for example, stated in an evaluation that Thomasson was "a true 'front runner' who should be groomed for the most senior leadership in tomorrow's Navy."

In early March, 1994, soon after reading the Navy message implementing the DoD Directives, Thomasson wrote and presented a letter to four Admirals for whom he served. Noting in the letter that "the time has come when I can remain silent no longer," Thomasson stated "I am gay" and expressed strong disagreement with the military's policy. In accordance with that policy, the Navy initiated separation proceedings against him. In May, 1994, a three-member Board of Inquiry convened and conducted a two day hearing. At the hearing, the Navy conceded that Thomasson had an "enviable" service record. But in seeking his separation, it relied both upon Thomasson's declaration that he was gay and the testimony of one of the Admirals who received the letter. The Navy advised the Board of the congressional findings that supported the Act and the meaning of the military's Directive. Under the Act and Directive, it argued, Thomasson's letter gave rise to a presumption that he had a propensity or intent to engage in homosexual acts which, if unrebutted, warranted separation.

For his part, Thomasson presented a copy of his service

record, live and written testimony from co-workers who expressed admiration for his capabilities and professionalism, a statement recounting his career and his decision to write the letter announcing that he was gay, and expert testimony on both homosexuality and the meaning of the military's policy. But Thomasson did not, as the district court observed, tender evidence to rebut the presumption that arose from his declaration of homosexuality; that is, he presented no specific evidence on whether he engaged in or had a propensity or intent to engage in homosexual acts. 895 F. Supp. at 823. In fact, Thomasson's statement averred that he would "not go further in degrading myself by disproving a charge about sexual conduct that no one has made." *Id.* The Navy argued that this defense fell short of rebutting the presumption that arose from Thomasson's declaration of his homosexuality, and therefore that he should be honorably discharged.

The Board unanimously found that Thomasson's announcement of his homosexuality gave rise to a presumption of a propensity or intent to engage in homosexual acts and that this presumption had not been rebutted. Because he thus violated Navy policy, Thomasson "failed to demonstrate acceptable qualities of leadership required of an officer in his grade" and the Board recommended that Thomasson be honorably discharged. A three-member Board of Review unanimously upheld this finding, and the Chief of Navy Personnel signed Thomasson's discharge orders. *Id.* He was scheduled to be separated in February, 1995.

Thomasson brought this action in February, 1995, seeking declaratory and injunctive relief to prevent his discharge. The district court preliminarily enjoined Thomasson's discharge pending resolution of his claims. Ultimately, however, the court granted summary judgment for the government. It held that the Act and Directive did not violate equal protection of the laws, the First Amendment, the Due Process Clause or the

Administrative Procedure Act. *Id.* at 831. Thomasson appealed that decision and his subsequent discharge from the Navy. A panel of this court heard argument in September, 1995, and the full court subsequently voted to hear the case *en banc*.

II.

A court cannot review a case without considering the context in which it arises. We shall explore that context in some detail. We do so out of a belief that this decision implicates in the most fundamental way the role of courts in our democratic system. Separation of powers principles form an integral part of the process of judicial review. To overlook these principles would be as much of an omission as a failure to address the substance of Thomasson's particular constitutional claims. What Thomasson seeks to upset here is a carefully crafted national political compromise, one that was the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government. While still a candidate, President Clinton expressed an intention to revisit the military's policy on homosexual service members. After he was sworn into office, the President on January 29, 1993, directed the Secretary of Defense to submit to him a draft Executive Order by July, 1993, "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces." Memorandum on Ending Discrimination in the Armed Forces, 1 Pub. Papers 23 (Jan. 29, 1993). The President instructed the Secretary to consult with the Joint Chiefs of Staff, Congress, and concerned individuals in developing the Order; the Order was to be accompanied by a study, which would recommend how the policy revision could be carried out in a way that was "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." *Id.* While this review was underway, an

interim policy was put in place which, in part, dictated that new recruits would no longer be questioned about their sexual orientation.

The issue quickly generated interest in Congress. In early February of 1993, an amendment was offered in the Senate to the Family and Medical Leave Act to overturn the interim policy by freezing in place the military's pre-existing approach with respect to homosexual service members. 139 Cong. Rec. S1263 (daily ed. Feb. 4, 1993). This effort failed, however, 139 Cong. Rec. S1338-9 (daily ed. Feb. 4, 1993), and the Senate instead adopted a provision calling for a review of the military's policy by the Secretary of Defense and the Senate Armed Services Committee, a review that was to be completed by July, 1993, 139 Cong. Rec. S1263, S1338 (daily ed. Feb. 4, 1993). After House approval, this amendment was enacted into law. Pub. L. 103-3 § 601, 107 Stat. 6, 28-9 (1993).

In the first seven months of 1993, both the Executive Branch and Congressional committees engaged in an extensive review of the military's policy. The Senate Armed Services Committee held no less than nine days of hearings, including a field hearing at the Norfolk Naval Complex, taking testimony from nearly fifty witnesses. The House Armed Services Committee held five days of hearings. Witnesses who appeared at these hearings represented a broad range of views and backgrounds. They included: the Secretary of Defense and the Chairman of the Joint Chiefs of Staff; military and legal experts; enlisted personnel, officers and senior military leaders; and activists supporting and opposing the military's policy. *See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993) (*Assessment of the Plan: House Hearings*); *Policy Concerning Homosexuality*

in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103d Cong., 1st Sess. (1993) (*Senate Hearings*); *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993) (*Policy Implications: House Hearings*).

At the same time, the Department of Defense conducted its own exhaustive review. It convened a military working group composed of senior members of each service, commissioned a study by the Rand Corporation, initiated regular consultations with the Joint Chiefs of Staff and leaders of each service, studied the history of the military's response to social change, and consulted legal experts. General Colin N. Powell described the consideration by the Joint Chiefs of Staff in this way: "We have challenged our assumptions. We have argued with each other. We have consulted with commanders at all levels." *Assessment of the Plan: House Hearings*, at 31.

On July 19, 1993, President Clinton announced a new policy on homosexuals in the military developed as a result of the Defense Department's review. The President and Secretary of Defense explained that under the new policy applicants for military service would not be asked or required to reveal their sexual orientation, but once in the service they would be separated for homosexual conduct. 1 Pub. Papers 1111 (July 19, 1993); *Senate Hearings*, at 705 (Statement of Secretary of Defense, Les Aspin). The Armed Services Committees of the House and Senate then reviewed the policy in detail.

In late July, 1993, drawing on the combined wisdom of this exhaustive examination in the Executive and Legislative branches, the House and Senate Armed Services Committees proposed to codify the military's policy on homosexual service members. The Senate stated that its proposal was developed

only after the committee considered "a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian. The committee received a broad variety of views . . . . The committee carefully considered all points of view in developing its recommendations." S. Rep. No. 112, 103d Cong., 1st Sess. 270 (1993). Likewise, the House committee reported that its recommendation was based on "an extensive hearing record, as well as a full consideration of the extended public debate on this issue." H. R. Rep. No. 200, 103d Cong., 1st Sess. 287 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2013, 2074.

Before the policy was finally enacted, the full House and Senate undertook a thorough debate of it, and both houses considered amendments on the floor. Each house discussed and rejected companion amendments that, in place of the proposed codification, would have permitted the President and military leaders to develop whatever policy they deemed appropriate. 139 Cong. Rec. S11168-11228 (daily ed. Sept. 9, 1993); 139 Cong. Rec. H7080-84 (daily ed. Sept. 28, 1993). The House also debated and rejected a proposal to require the Defense Department to resume its questioning of new recruits about their sexual orientation. 139 Cong. Rec. H7084-86 (daily ed. Sept. 28, 1993).

Both houses ultimately approved the committee proposals. In the words of the Chairman of the Senate Armed Services Committee, the provision was "as fair as we can be to the individuals involved, while, at the same time, maintaining the kind of unit cohesion and military effectiveness that we expect our military services to be able to carry out and perform for the country." 139 Cong. Rec. S11205 (daily ed. Sept. 9, 1993); *see also* 139 Cong. Rec. H7086-89 (daily ed. Sept. 28, 1993). Finally, the Act was signed by the President on November 30, 1993.

What Thomasson challenges, therefore, is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation. Such products of the democratic process are seldom completely tidy or universally satisfactory, but it is precisely on that account that they deserve judicial respect. An Act of Congress reflects a range of views that a judicial decision cannot replicate. Indeed, Justice Holmes admonished that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" that a court performs. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). And "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government', [this court cannot] lightly second-guess such legislative judgments . . . ." *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 251 (1990) (O'Connor, J.) (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 319 (1985)) (other citation omitted).

Thomasson requests that we simply set aside these lengthy labors of the legislative process and supplant with our own judicial judgment the product of a serious and prolonged debate on a subject of paramount national importance. This would, however, be a step of substantial gravity. The courts were not created to award by judicial decree what was not achievable by political consensus. Our power to resolve particular controversies carries with it an obligation to respect general solutions. To overturn those solutions in the absence of a clear constitutional mandate would transform the judiciary into an instrument of disenfranchisement for all who use the political process to register the democratic will.

The Supreme Court could have been speaking about this very Act when it observed that the question "received considerable national attention and was the subject of wide-

ranging public debate [and] was extensively considered by Congress in hearings, floor debate, and in committee." *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (sustaining constitutionality of all-male draft registration). Congress has enacted and the President has signed legislation providing that a propensity or intent to engage in homosexual acts is incompatible with the distinctive requirements of military service. This considered judgment on the part of the coordinate branches of our government is one that the third branch has a solemn duty to respect.

III.

A.

Thomasson's challenge cannot be viewed apart from the special legal status of military life. The Constitution assigns the conduct of military affairs to the Legislative and Executive branches. There is nothing timid or half-hearted about this constitutional allocation of authority. Rather, the Constitution states fully and directly that the governance of military affairs is a shared responsibility of Congress and the President:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;

> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. CONST. art I, § 8.

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

U.S. CONST. art II, § 2.

This constitutional framework was adopted by the Founders in order that our newly christened nation might best defend itself. *See Federalist No. 23* (Alexander Hamilton) (Mentor, 1961). As Hamilton explained:

> The authorities essential to the common defense . . . ought to exist without limitation *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it

is committed.

Id. at 153 (emphasis in original). Hamilton believed that this authority should include "any matter essential to the *formation, direction, or support* of the NATIONAL FORCES." *Id.* at 154 (emphasis in original).

Thus, it is no surprise that the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President. *See* U.S. CONST. art III. To do so would have placed, in Hamilton's words, a "constitutional shackle" on the ability of Congress and the President to carry out the duties attendant to national security. Moreover, the virtue of placing military power in the democratic branches was obvious: "[I]f the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it." *Federalist No. 26*, at 172 (Alexander Hamilton). The federal judiciary--appointed with life tenure--was not regarded as an appropriate repository for such immense power and accordingly was given "no influence over either the sword or the purse." *Federalist No. 78*, at 465 (Alexander Hamilton).

Thus, our Constitution does not authorize the courts to lay and collect taxes to provide for the common defense. The Constitution does not allow the courts to declare war or to raise armies. The judiciary has no authority to make rules for the regulation of military forces. Nor does the Constitution declare the Supreme Court to be the Commander in Chief. By comparison to its predecessors, Article III is a sparse provision, granting no enumerated powers of any kind, but merely jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art III, § 2.

B.

Because "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline,'" *Weiss v. United States*, 114 S. Ct. 752, 760 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)), the Supreme Court has consistently approached congressional decisions made pursuant to the national security clauses with great respect. In fact, "judicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker*, 453 U.S. at 70; *see also Weiss*, 114 S. Ct. at 760-61.

The deference mandated by the Constitution has extended to a variety of challenges to Congressional and Executive decisions: Congress' power to order members of the National Guard into service, *Perpich v. Department of Defense*, 496 U.S. 334 (1990); the President's authority as Commander in Chief to "classify and control access to information bearing on national security," *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988); Congress' decision to require only males to register for the draft, *Rostker*, 453 U.S. at 57; Congress' regulation of the conduct of military personnel under the Uniform Code of Military Justice, *Parker v. Levy*, 417 U.S. 733 (1974); and the President's discretion as Commander in Chief to grant a military commission, *Orloff v. Willoughby*, 345 U.S. 83 (1953). Courts have also held that the question of a war's legality is nonjusticiable. *Atlee v. Laird*, 347 F. Supp. 689 (E.D.Pa. 1972), *aff'd summarily sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

Aside from the Constitution itself, the need for deference

also arises from the unique role that national defense plays in a democracy. Because our nation's very preservation hinges on decisions regarding war and preparation for war, the nation collectively, as expressed through its elected officials, faces "'the delicate task of balancing the rights of servicemen against the needs of the military.'" *Weiss*, 114 S. Ct. at 761 (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)). To the degree that the judiciary is permitted to circumscribe the national security options of our elected officials, it "decreases the ability of the political branches to impose their will on another [nation and at] the worst, it permits the imposition of the will of another [nation] on the United States." James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 237-238 (1983). After all, "[u]nless a society has the capability . . . to defend itself from the aggressions of others, constitutional protections of any sort have little meaning." *Wayte v. United States*, 470 U.S. 598, 612 (1985).

National defense decisions not only implicate each citizen in the most profound way. Such decisions also require policy choices, which the legislature is equipped to make and the judiciary is not. "Congress, working with the Executive Branch, has developed a system of military criminal and administrative law that carefully balances the rights of individual servicemembers and the needs of the armed forces." Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 Wake Forest L. Rev. 557, 566 (1994). While Congress and the President have access to intelligence and testimony on military readiness, the federal judiciary does not. While Congress and the members of the Executive Branch have developed a practiced expertise by virtue of their day-to-day supervision of the military, the federal judiciary has not. The judiciary has no Armed Services Committee, Foreign Relations Committee, Department of

Defense, or Department of State. As the Supreme Court has noted, "the lack of competence on the part of the courts [with respect to military judgments] is marked." *Rostker*, 453 U.S. at 65. In fact,

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

Finally, the imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer. Even when there is opposition to a proposed change--as when Congress abolished flogging in the 19th century or when President Truman ended the military's racial segregation in 1948, *see* Hirschhorn, 62 N.C. L. Rev. at 243-45--the fact that the change emanates from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged societal division. In contrast, when courts impose military policy in the face of deep social division, the nation inherently runs the risk of long-term social discord because large segments of our population have been deprived of a democratic means of change. In the military context, such divisiveness could constitute an independent threat to national security.

C.

Parallel to the deference owed Congressional and Presidential policies is deference to the decision-making authority of military personnel who "have been charged by the

Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Judicial interference with the subordinate decisions of military authorities frustrates the national security goals that the democratic branches have sought to achieve.

The Supreme Court has recognized the need for deference when facing challenges to a variety of military decisions: a policy that prohibited the wearing of headgear in certain circumstances, *Goldman*, 475 U.S. at 506 (noting that the military is "a specialized society separate from civilian society"); an Air Force regulation that required service members to obtain permission before circulating petitions on bases, *Brown v. Glines*, 444 U.S. 348, 357 (1980) (noting that "the military must possess substantial discretion over its internal discipline"); a base policy that prohibited certain political activity on base premises, *Greer v. Spock*, 424 U.S. 828, 837 (1976) (noting "the special constitutional function of the military in our national life"); and military court-martial proceedings, *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (noting that "[t]o prepare for and perform its vital role, the military must insist upon a respect for duty and discipline without counterpart in civilian life").

The need for deference also derives from the military's experience with the particular exigencies of military life. Among these is the attainment of unit cohesion--"the subordination of personal preferences and identities in favor of the overall group mission" and "the habit of immediate compliance with military procedures and orders." *Goldman*, 475 U.S. at 508. Should the judiciary interfere with the intricate mix of morale and discipline that fosters unit cohesion, it is simply impossible to estimate the damage that a particular change could inflict upon national security--"there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of

[military] failure." Hirschhorn, 62 N.C. L. Rev. at 240.

D.

Here the judiciary has been asked in effect to evaluate the appropriate policy regarding homosexuality in the military. The need for circumspection is as real as in the previous military cases decided by the Supreme Court. *See Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) (en banc). The elected branches have already weighed the contribution that homosexual service members might make against the disruption that homosexual acts and propensities could cause. The particular policy before us is, as we have noted, the product of extensive deliberation on the part of Congress and the President. In the end, alternatives to that policy were rejected because "the maintenance of military unit cohesion--which is the key to combat capability--. . . must remain paramount over the desires of a single individual or group." H. R. Rep. No. 200, at 2074. To the extent that our renouncement of the accepted policy would require adoption of a rejected one, the damage inflicted by judicial decree on democratic decision-making will have been immense.

We likewise owe respect to the military's "estimation of the effect of homosexual conduct on military discipline." *Steffan*, 41 F.3d at 686. This estimation will be made through innumerable personnel decisions informed by the military's assessment of the unique demands of military life. Here, in accordance with military policy, the Navy instituted separation proceedings through a three-member Board of Inquiry, which heard two days of testimony and unanimously voted to honorably discharge Thomasson. The Board of Inquiry's decision was unanimously upheld by a three-member Board of Review, and the Chief of Navy Personnel signed Thomasson's discharge orders. While Thomasson now claims that he successfully rebutted the presumption created by his statement,

the military boards found otherwise because Thomasson presented no specific evidence on whether he engaged in or had a propensity to engage in homosexual acts. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349 (1976); *see also Collins v. Harker Heights*, 503 U.S. 115, 129 (1992) ("The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions'") (quoting *Bishop*, 426 U.S. at 350). If this is true of state personnel decisions (in *Bishop*, a police officer fired by a city manager), it should be all the more true in military affairs, where respect for the military's internal personnel system is an essential component of the most fundamental of constitutional pursuits, national security itself.

None of this means, of course, that the statute before us may escape constitutional scrutiny. Rather, it is part of the process of constitutional scrutiny to recognize when the Constitution itself requires special deference. *Rostker*, 453 U.S. at 67. In the area of military affairs, the constitutional chartering of popular control is powerfully clear and purposefully redundant. Ultimately, "[t]he special status of the military has required, the Constitution has contemplated, Congress has created, and [the Supreme] Court has long recognized" that constitutional challenges to military personnel policies and decisions face heavy burdens. *Chappell*, 462 U.S. at 303-4. It is with those burdens in mind that we address appellant's particular arguments.

IV.

We turn first to Thomasson's contention that the statute, on its face and as applied, contravenes the Fifth Amendment's guarantee of equal protection of the laws. Thomasson claims that the stated justification for this statute--the protection of

unit cohesion--is not a legitimate one because it is nothing more than a pretext for prejudice against homosexual service members. He maintains that the means chosen by Congress to promote this statutory purpose are also flawed because they treat declared homosexuals differently from heterosexuals and from homosexuals who decline to declare their sexual orientation.

A.

We address initially Thomasson's effort to invoke heightened judicial scrutiny of this statutory scheme. The searching review that is the hallmark of strict scrutiny is appropriate only in limited cases, where the statute classifies along inherently suspect lines or burdens the exercise of a fundamental constitutional right. *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Only a few classifications trigger heightened scrutiny. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin subject to strict scrutiny); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (illegitimacy subject to intermediate scrutiny); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender subject to intermediate scrutiny). And because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that "respect for the separation of powers" should make courts reluctant to establish new suspect classes. *Cleburne*, 473 U.S. at 441; *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (declining to extend strict scrutiny to "[c]lose relatives"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (declining to extend strict scrutiny to the elderly). This reluctance has even more force when the intense judicial scrutiny would be applied to the "specialized society" of the military. *Parker*, 417 U.S.

at 743.

The statutory classification here is not suspect, nor does it burden any fundamental right. Section 654(b) is aimed at service members who engage in or have a propensity to engage in homosexual acts. A class comprised of service members who engage in or have a propensity or intent to engage in such acts is not inherently suspect. *See Steffan*, 41 F.3d at 684 n.3 (classification comprised of persons who engage in acts that the military can legitimately proscribe is not suspect). Similarly, there is no fundamental constitutional right on the part of a service member to engage in homosexual acts and there is a legitimate military interest in preventing the same. Heightened scrutiny of this statute would involve the judiciary in an inventive constitutional enterprise, and it would frustrate the elected branches of government in their efforts to deal with this question. Rational basis is accordingly the suitable standard of review.

B.

It is settled law that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). The question is simply whether the legislative classification is *rationally related* to a *legitimate governmental interest*. *Heller*, 113 S. Ct. at 2642. Under this standard, the Act is entitled to "a strong presumption of validity," *id.*, and must be sustained if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification,'" *id.* at 2642-43 (quoting *Beach Communications*, 113 S. Ct. at 2101). To sustain the validity of its policy, the government is not required to provide empirical evidence. "[A] legislative choice is not

subject to courtroom factfinding . . . ." *Beach Communications*, 113 S. Ct. at 2102. Rather, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller*, 113 S. Ct. at 2643 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

1.

Under these standards, the Act does not violate the equal protection guarantee. Instead, it reflects a legitimate legislative choice. Whether members of the judicial branch agree or disagree with that choice is irrelevant, for the Constitution envisions the rule of law, not the reign of judges. Congress, after months of discussion, concluded that those who engage in or have a propensity to engage in homosexual acts impair military readiness. The Act accordingly observes that the "long-standing" prohibition on homosexual conduct "continues to be necessary in the unique circumstances of military service," 10 U.S.C. § 654(a)(13), and that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," 10 U.S.C. § 654(a)(15).

These judgments reflect in turn Congress' view of military life, which can be, on a round-the-clock basis, "spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12). Out of this forced intimacy are forged the bonds that create unit cohesion, which Congress found to be a "critical element[ ]" of combat readiness. 10 U.S.C.§ 654(a)(7). In short, "to win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the

cohesion of the group . . . . We cannot allow anything to happen which would disrupt that feeling of cohesion within the force." *Senate Hearings*, at 708 (Statement of Chairman of the Joint Chiefs of Staff, General Colin L. Powell). Military leaders testified time and again how unit cohesion would be undermined: "[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." S. Rep. No. 112, at 280 (Statement of General H. Norman Schwarzkopf).

It was legitimate, therefore, for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity. It was appropriate for Congress to believe that a military force should be as free as possible of sexual attachments and pressures as it prepared to do battle. Any argument that Congress was misguided in this view is one of legislative policy, not constitutional law. Courts have held that military authorities may discharge those who engage in homosexual acts. *Steffan*, 41 F.3d at 685 and n.4; *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to *prevent* the commission of such acts. *See Steffan*, 41 F.3d at 685-86; *Ben-Shalom*, 881 F.2d at 464. The statements provision, by discharging those with a propensity or intent to engage in homosexual acts, operates in this preventive way. As the Senate Committee described the provision: "[i]t is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or

intent . . . ripens into specific conduct prejudicial to good order and discipline." S. Rep. No. 112, at 294. This goal is itself a valid one. No constitutional constraint prohibits the military from preventing acts that would threaten combat capability. *See Greer*, 424 U.S. at 840; *see also Steffan*, 41 F.3d at 689; *Ben-Shalom*, 881 F.2d at 460-61, 464.

The conditions of military life, whether in barracks or aboard ship or in situations of collective peril, may throw service members into situations where sexual tensions are especially unwelcome. S. Rep. No. 112, at 277-80. "Many soldiers experience a forced association 24 hours a day. They work together; they eat together; they share living space together; they train together; they shop for groceries together; they worship together. Same-gender sexual attraction in such a 'forced association' environment is something that civilians rarely experience and cannot fully understand." *Senate Hearings*, at 762 (Statement of General Gordon Sullivan). Section 654(b) thus accommodates the reasonable privacy concerns of heterosexual service members and reduces the sexual problems that may arise when some members of the unit have a propensity or intent to engage in homosexual acts and others do not. These same concerns for privacy and sexual tension explain the military's policy of providing service men and women with separate living quarters. *Id.* at 277-78.

2.

Thomasson maintains that the statements provision of §654(b)(2) is not rationally related to the interests of unit cohesion and protection of sexual privacy, even if those interests could be seen to be legitimate. He argues that it is not rational or permissible to presume that declared homosexuals possess a unique propensity to engage in homosexual acts.

We think, however, that the means chosen by Congress in the Act are rationally related to legitimate legislative ends. The presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis. *See Steffan*, 41 F.3d at 686; *Ben-Shalom*, 881 F.2d at 464. In fact, the presumption, which Thomasson was explicitly advised of, represents perhaps the most sensible inference raised by a declaration of one's sexual orientation. As the Senate Committee noted: "It would be irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate . . . ." S. Rep. No. 112, at 284. Although Thomasson argues that some declared homosexuals have not engaged in or do not have a propensity or intent to engage in homosexual acts, "courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 113 S. Ct. at 2643. As a general matter, the legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts. While some service members have rebutted that presumption before military boards of review, *see Richenberg v. Perry*, 909 F.Supp 1303, 1313 (D. Neb. 1995); *Able v. United States*, 880 F. Supp. 968, 976 (E.D.N.Y. 1995), Thomasson did not demonstrate that he lacked a propensity to engage in homosexual acts. The general evidence offered at his discharge hearing had no bearing on this particular question.

Not only is the presumption rational, it is also permissible. Thomasson argues that it is illegitimate to separate him for a mere "propensity" to engage in acts. But in the civil context, the government can fashion general employment policies to prevent unsatisfactory conduct. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 589-92 (1979) (upholding policy barring methadone users from employment); *Vance v. Bradley*, 440 U.S. 93, 106 (1979) (upholding mandatory retirement age for Foreign Service

personnel); *Massachusetts Bd. of Retirement*, 427 U.S. at 314-17 (upholding mandatory retirement age for police officers). In fact, the statement's presumption is a reasonable means of allocating the burden of proof: It places the burden on the party with the most knowledge of the facts (here the military officer), and it frees the military from engaging in detective work. In a civil setting, moreover, "the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585 (1976) (footnote omitted).

Finally, the statute is not, as Thomasson maintains, irrational due to any purported distinction between declared and undeclared homosexuals. The policy instead rationally initiates discharge proceedings when service members, by declaring their homosexuality, thereby provide affirmative evidence to military officials of their propensity or intent to engage in homosexual acts. Thomasson apparently argues that the failure of military authorities to inquire into all service members' propensity to engage in homosexual acts somehow renders the policy unconstitutionally imprecise. But the decision to stop questioning new recruits about their sexual orientation reflects an allocation of military resources and a balance of competing interests, one that does not undermine the basic constitutionality of the Act. Under rational basis review, a classification does not fail because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citation omitted); *see Vance*, 440 U.S. at 108.

In sum, we conclude that the Act represents a legitimate legislative match of ends and means that withstands appellant's equal protection challenge.

V.

Thomasson also argues that the statute, both on its face and as applied, violates the First Amendment. He was, he contends, separated from the service for doing nothing more than declaring he was gay. According to Thomasson, the statements provision of 10 U.S.C. § 654 thus operates to suppress speech on the basis of its content and viewpoint. It does so, he asserts, by making a specific category of speech--a statement declaring a service member's homosexuality--itself a basis for discharge. As a result, he contends, the provision must serve a compelling governmental interest and must be necessary to promote that interest.

Thomasson, however, misinterprets the basic purpose of the policy. The statute does not target speech declaring homosexuality; rather, it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue--"the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime," or, as is the case here, "to prove motive or intent." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993); *see Dawson v. Delaware*, 503 U.S. 159, 165 (1992); *Wayte*, 470 U.S. at 610-14. Discriminatory words often provide the basis for challenges to discriminatory acts under Title VII, for instance, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion), yet employers enjoy no First Amendment right to keep those words out of court. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (observing that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

There is no constitutional impediment, therefore, to the use of speech as relevant evidence of facts that may furnish a permissible basis for separation from military service. No First Amendment concern would arise, for instance, from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances. Such remarks provide evidence of activity that the military may validly proscribe. And, as we discussed above, the military may take measures to prevent the commission of sexual activity that it deems detrimental to its mission. Based upon this rationale, courts have consistently rejected First Amendment challenges to the use of a service member's declaration of homosexuality as a basis for separation. *See Pruitt v. Cheney*, 963 F.2d 1160, 1163-64 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992); *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992); *Ben-Shalom*, 881 F.2d at 462. A declaration of homosexuality, "like most admissions, [is] made in speech," noted one such court, "but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted." *Pruitt*, 963 F.2d at 1164.

Thomasson asserts, however, that this reasoning is not applicable to the new policy. He points to language in the DoD Directive stating that "sexual orientation is considered a personal and private matter" and "is not a bar to continued service." DoD Dir. 1332.30, Enc. 2 ¶ C, at 2-1. He infers from this language that speech disclosing one's homosexuality admits to nothing unlawful, and hence lacks any evidentiary value. According to Thomasson, the policy thus at bottom distinguishes declared homosexuals from undeclared homosexuals, penalizing only the former on the basis of their speech.

While imaginative, Thomasson's argument fails to alter

our conclusion that the new policy is in fact directed at the propensity or intent of service members to engage in homosexual acts, and uses speech declaring homosexuality as evidence thereof. First, Thomasson's charge that such a declaration lacks any evidentiary value is patently erroneous. As we explained in rejecting Thomasson's equal protection challenge, a service member's statement that he is a homosexual has substantial evidentiary value regarding whether he has a propensity to engage in homosexual acts--"the military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct." *Steffan*, 41 F.3d at 686; *see Ben-Shalom*, 881 F.2d at 464.

Second, the statutory provision does *not* at its core distinguish between declared and undeclared homosexuals, the central premise of Thomasson's First Amendment argument. Instead, it distinguishes service members who have a propensity or intent to engage in homosexual acts from other members, and uses a declaration of homosexuality as evidence. The statute's operation confirms as much. Service members who state that they are homosexual can avoid separation by rebutting the presumption that they have a propensity or intent to engage in homosexual acts. 10 U.S.C. § 654(b)(2); DoD Dir. 1332.30, Enc. 2 ¶ C.1.b., at 2-2. Although Thomasson chose not to come forward with evidence in this regard, other members subject to discharge under the statements provision have successfully demonstrated that they lack a propensity or intent to engage in homosexual acts. *See Richenberg*, 909 F. Supp. at 1313; *Able*, 880 F. Supp. at 976.

Moreover, service members who have never spoken about their sexual orientation are still subject to separation if they are found to have engaged or attempted to engage in

homosexual acts. 10 U.S.C. § 654(b)(1); DoD Dir. 1332.30. Enc. 2 ¶ C.1.a., at 2-2. In a similar vein, service members who have not publicly declared their homosexuality are nevertheless subject to discharge if they have made private statements to that effect, when those statements are brought to the attention of commanding officers and the evidence regarding any such private statement is credible. *See* S. Rep. No. 112, at 291-92. Again, the statute's essential concern is not with speech declaring homosexuality, as Thomasson alleges, but is instead with the propensity or intent to engage in acts which Congress has deemed detrimental to the military's mission.

Because the statute aims at this propensity, not at speech, it is not a viewpoint-based or content-based regulation. With respect to the former, the statute's treatment of a declaration of homosexuality is not based on a desire to suppress any viewpoint that the statement might convey. The declaration asserts a fact, one that the military uses as evidence of a propensity or intent to engage in homosexual acts. The military, however, allows service members to express views on issues that affect homosexuals. As the district court found, members are "free to affiliate with a group that opposes the policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual newspapers, or engage in other such expressive activities." 895 F. Supp. at 825; *see* DoD Dir. 1332.30, Enc. 8, ¶ C.3.d., at 8-2; *see also Assessment of the Plan: House Hearings*, 35-37 (Statement of Gen. Colin Powell).

The statute likewise does not discriminate on the basis of the content of speech. Whenever a provision prohibits certain acts, it necessarily chills speech that constitutes evidence of the acts. A regulation directed at acts thus inevitably restricts a certain type of speech; this policy is no exception. But effects of this variety do not establish a content-based

restriction of speech. In *Wayte v. United States*, for example, the Supreme Court rejected a First Amendment challenge to the government's policy of prosecuting only those violators of draft registration laws who either reported themselves or were reported by others. 470 U.S. at 610-14. The petitioner, Wayte, alleged that the policy "inevitably created a content-based regulatory system" with a "content-based impact on non-registrants" such as himself. *Id.* at 611. But the Supreme Court treated the policy as a content-neutral regulation, observing that letters informing the government of an intent not to obey conscription requirements "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply--one of the elements of the offense." *Id.* at 612-13.

A regulation is thus "content-neutral so long as it is '*justified* without reference to the content of the regulated speech,'" even if it has an "effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted) (emphasis in original). For instance, the Supreme Court deemed to be content-neutral an ordinance that distinguished adult film theaters from other kinds of theaters, as the regulation was "aimed not at the *content* of the films" but at the "*effects* of such theaters on the surrounding community." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (emphasis in original). The civil rights laws also penalize a specific type of speech in certain contexts--speech expressing discriminatory views--yet the Supreme Court regards Title VII "as an example of a permissible content-neutral regulation." *Mitchell*, 113 S. Ct. at 2200; *see R.A.V.*, 112 S. Ct. at 2546. The military policy here is justified on a content-neutral, nonspeech basis: preventing the disruptions that homosexual activity among service members might have on military readiness. That the policy may hinge the commencement of administrative proceedings on a particular type of statement

does not convert it into a content-based enactment. *See Wayte*, 470 U.S. at 610-14.

Thomasson's constitutional challenge faces yet another hurdle. Members of the armed services have never possessed all the First Amendment rights of the civilian population. Rather, the Supreme Court has made clear that special First Amendment considerations surround the military environment. The Supreme Court has characterized its "review of military regulations challenged on First Amendment grounds" as "far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507. In *Brown v. Glines*, for instance, the Supreme Court upheld against a First Amendment challenge Air Force regulations that required service members to obtain permission from their base commanders before circulating petitions, noting that "'[s]peech that is protected in the civil population may . . . undermine the effectiveness of response to command.'" 444 U.S. at 354 (citations omitted). In general, the Court observed, "while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" *Id.* (quoting *Parker*, 417 U.S. at 758).

Finally, even with respect to non-military public employment, government may restrict certain types of speech to promote the effective performance of its function. *See Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In such cases, courts must give "full consideration" to "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. Indeed, "where the government is employing someone for the very purpose of effectively achieving its goals," restrictions on speech "may well be

appropriate." *Waters*, 114 S. Ct. at 1888 (plurality opinion). Congress expressly found that the statute at issue here was justified on grounds relating to performance of the military function, perhaps the most important of all governmental responsibilities. 10 U.S.C. § 654(a)(15). For the same reasons we identified in rejecting Thomasson's equal protection claim, the use of statements of one's homosexuality as evidence of a propensity or intent to engage in homosexual acts is justifiable under the standards associated with content-neutral military rules, *see Glines*, 444 U.S. at 354-55, and as an allowable means of furthering the nation's military mission.

VI.

In a final series of catch-all claims, Thomasson alleges that the Act violates basic guarantees of due process and procedural fairness conferred by the Constitution and the Administrative Procedure Act. 5 U.S.C. §§ 551 *et. seq.* First, he contends that it is irrational to presume that one who states that he is a homosexual engages in or has a propensity or intent to engage in homosexual acts. Second, he maintains that the presumption is rebuttable only in theory, and is irrebuttable in practice. Finally, he alleges that his discharge was arbitrary and capricious and unsupported by substantial evidence.

We have already rejected much of the substance of these allegations in our discussion of Thomasson's equal protection and First Amendment claims. The policy's rebuttable presumption is entirely rational, as we have explained in ruling on Thomasson's equal protection challenge. The proceedings complied with any requirements imposed by the Administrative Procedure Act--Thomasson received a full and adequate hearing in which substantial evidence established that he stated that he was a homosexual and that he failed to rebut the presumption triggered thereby. *See Thomasson*, 895 F.

Supp. at 831. In short, Thomasson's claims that his discharge violated due process and the Administrative Procedure Act are without merit.

VII.

We have carefully reviewed Thomasson's various claims, but we cannot accept them. To do so would not only overturn the efforts of the elected branches of government to resolve a significant question of national military policy. It would also violate much plain and settled Supreme Court precedent. In the end, the best service courts can render is to return this debate to where it all began--to the halls of democratic governance, where the many Americans affected by decisions such as these can participate directly in their resolution.

The judgment of the district court is hereby affirmed.

AFFIRMED

MURNAGHAN, Circuit Judge, concurring:

I concur. Because an extended discussion of judicial deference to the military is unnecessary, I would dispose of the matter much more simply. The case concerns a rebuttable presumption which Thomasson did not rebut. Whether the employer was a military or non-military body, it is enough that the presumption used is rational and thus constitutional.

LUTTIG, Circuit Judge, concurring:

The statute governing homosexuals in the Armed Services

that was enacted by the Congress of the United States and signed by the President forbids known homosexuals from serving in the military. As Lt. Thomasson has steadfastly maintained, the statute, and the policy it embodies, is not at all conduct-based in the sense now argued by the Executive Branch, assertedly on behalf of the Congress. The statute requires the discharge of homosexual service members who merely say that they are homosexual or otherwise evidence their homosexuality, regardless of whether they have actually engaged in homosexual conduct or are likely to engage in any such conduct.

The requirement that, in order to be discharged, one must at least demonstrate a likelihood to engage in homosexual acts exists only in a regulation promulgated by the Administration, ostensibly in implementation of the statute. That regulation redefines the statutory term "propensity" so that only those homosexual service members who are *likely* to engage in homosexual acts will be discharged. Through this regulation the Administration has effectively secured the very policy regarding military service by homosexuals that it was denied by the Congress.

Rather than continue to indulge the politically expedient fiction that the congressionally-mandated policy bars from service only those known homosexuals who are likely to engage in homosexual acts -- a fiction that both of these parties urge upon us because it serves their mutual interest in creating a sanctuary for homosexuals within the military -- I would simply invalidate the Administration's regulation as in excess of its statutory authority. Then, having done so, I would sustain the policy that was actually enacted into law as a permissible exercise of Congress' constitutional authority "To make Rules for the Government and Regulation" of the military. U.S. Const. art. I, § 8, cl. 14. As the Solicitor General maintained at argument, and as the courts have

uniformly held in analogous contexts, it is well within the plenary authority of the Congress to exclude homosexuals from military service because of the deleterious effects that knowledge of their attraction for members of the same sex has on unit cohesion and military effectiveness.

The Administration stridently argues that the question of the validity of the regulation is not before us. Thomasson, however, unequivocally draws into question the validity of the regulation through his argument that, despite the conduct-based regulation, the military's policy is status-based:

> *The [Family Research] Council asserts that the Department of Defense and Navy regulations at issue in this case conflict with the Congressional intent of the statute* that is also at issue. . . . In support of its motion, the Council asserts that the parties have overlooked this point. In fact, however, *this point was raised in Lt. Thomasson's brief and was extensively addressed by both parties at the prior argument in this appeal. See, e.g.*, Brief for Appellant at 45 n.47, 45-49.

Appellant's Resp. to Mot. of *Amicus Curiae* Family Research Council for Leave to Participate in Oral Argument at 2 & n.1 (emphasis added). And the Administration defends its policy entirely on the grounds that the regulation is the source of the conduct-based rationale for the policy. Thus, both parties clearly believe that the constitutionality of the "Don't Ask; Don't Tell" policy turns upon the regulatory redefinition of "propensity" to mean a likelihood of future conduct.

I.

For as long as it has had a military, the United States has excluded homosexuals from military service. During the 1992 election campaign, then-Governor Clinton said that, if elected,

he would repeal this long-standing ban on homosexuals, *see* S. Rep. No. 112, 103d Cong., 1st Sess. 267 (1993), and, true to his promise, slightly more than a week after assuming office President Clinton announced in his first press conference that he was directing Secretary of Defense Aspin to prepare an Executive Order "ending discrimination [in the military] on the basis of sexual orientation." Memorandum on Ending Discrimination in the Armed Forces, 1 Public Papers of the Presidents, William J. Clinton, Jan. 29, 1993, at 23 ("Pub. Papers"); *see also* J.A. at 335.[1/] During this press conference, *see* The President's News Conference, 1 Pub. Papers 20, 21 (Jan. 29, 1993), President Clinton embraced as consistent with his own views the distinction between homosexual status and homosexual conduct drawn by the federal District Court for the Central District of California in a decision that had been rendered only the previous day. *See Meinhold* v. *United States Department of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1469 (9th Cir. 1994). In *Meinhold*, the district court had enjoined the Department of Defense from discharging homosexuals based on sexual orientation, absent any evidence of homosexual conduct.

A political firestorm erupted over the President's announced plans to lift the ban on homosexuals. Congress, for its part, convened hearings to consider the effect that the President's proposed elimination of the ban would have on military capability. It also created a Military Working Group

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[1/] President Clinton adopted an interim policy effective until July 15, 1993, that retained the prior ban on service by homosexuals, with two modifications: 1) new recruits would not be questioned about their sexual orientation; and 2) homosexuals who had not engaged in homosexual acts would be processed through separation from active duty, but would be placed in the Standby Reserve during the interim period. S. Rep. No. 112 at 268.

to consider the President's proposal, which, on July 1, 1993, released a report concluding that "*the presence of open homosexuals* in a unit would, in general, polarize and fragment the unit and destroy the bonding and singleness of purpose required for effective military operations." Summary Report of the Military Working Group 5 (July 1, 1993) (emphasis added).

Despite the conclusion of the Military Working Group that the mere presence of homosexuals would detrimentally affect unit cohesion, the "Policy on Homosexual Conduct in the Armed Forces" transmitted by Secretary Aspin to the Secretaries of the Army, Navy and Air Force and to the Chairman of the Joint Chiefs of Staff on July 19, 1993, provided as follows:

> [I]t is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

Memorandum from The Secretary of Defense, July 19, 1993, at 1 ("July 19th Memorandum"), *reprinted in* Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103rd Cong., 1st Sess. 22 (1993) (H.A.S.C. No. 103-19). At a press conference that same day, President Clinton himself announced the new policy, explaining that "service men and women [under the new policy] will be judged based on their conduct, not their sexual orientation," and suggesting strongly that known homosexuals could remain in military service

provided they did not engage in conduct violative of the Uniform Code of Military Justice. Remarks Announcing the New Policy on Homosexuals in the Military, 1 Pub. Papers 1109, 1111 (July 19, 1993); *see id.* at 1109 ("[The new policy] provides greater protection to those who happen to be homosexual and want to serve their country honorably in uniform, *obeying all the military's rules against sexual misconduct*." (emphasis added)).

Concerned that the new policy as described by the President would allow open homosexuals to serve in the military, Congress questioned Administration officials at length on the precise meaning of the new policy, enacting the legislation that we now have before us only after it was convinced that the new policy would retain the ban on service by homosexuals. *See, e.g.*, S. Rep. No. 112 at 289 ("Based upon the testimony [by Secretary Aspin, the Joint Chiefs of Staff, the General Counsel of the Department of Defense, and the Military Working Group] received at the hearing, the committee finds that the Department of Defense has retained the central features of its policy concerning homosexuality in the armed forces," namely, "mandatory discharge" for "homosexual acts, marriages, and statements that demonstrate a propensity to engage in homosexual acts."). Congress thus codified the long-standing ban against service by homosexuals, 10 U.S.C. § 654, adopting in an uncodified "sense of Congress" provision the President's interim policy ceasing the questioning of new recruits about their sexual orientation. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160,§ 571 (d)(1), 107 Stat. 1547, 1673 (1993). Even so, Congress included a proviso that the Secretary of Defense could reinstate the questioning of new recruits if, in the Secretary's view, such ultimately proved necessary to implement the statutory ban on service by known

homosexuals. *See id.*[2/]

It is this statutory policy enacted by Congress, not the policy advocated by President Clinton in January 1993 or the policy implemented by the Secretary through regulation, that was signed into law on November 30, 1993.

II.

A.

Section 571(a) of the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654, like the pre-1993 Department of Defense Directives it codifies, unambiguously prohibits all known homosexuals from serving in the military, regardless of the likelihood that they will violate the Uniform Code of Military Justice prohibition against sodomy, *see* Article 125, U.C.M.J., 10 U.S.C. § 925, or engage in other homosexual acts as defined by the statute, *see* 10 U.S.C. § 654(f)(3).[3/] The statute defines "homosexual" as "a person,

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[2/] Section 571(d) provides, in relevant part:

> SENSE OF CONGRESS.--It is the sense of Congress that--
>
> (1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code.

[3/] "Homosexual act" is defined by the statute as:

(continued...)

regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* at § 654(f)(1). It then provides that a service member who states that he is homosexual (or otherwise evidences his homosexuality)[4/] shall be separated from service unless he demonstrates that he is not, *as statutorily defined*, a "homosexual":

> A member of the armed forces shall be separated . . . if [*inter alia*] . . . the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id. at § 654(b)(2) (the "statements" provision). The presumption that one is homosexual which arises from one's

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[3/](...continued)

> (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
>
> (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

10 U.S.C. § 654(f)(3). The relevant portion of the U.C.M.J. prohibits only "sodomy," defined as "unnatural carnal copulation with another person of the same or opposite sex or with an animal." *Id.* at § 925.

[4/] *See* DoD Directive 1332.30, Encl. 1, ¶ 18 (March 4, 1994) ("Statement that a Member Is a Homosexual or Bisexual or Words to That Effect" defined as "Language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.").

statement of homosexuality, in other words, can be rebutted *only* by proving that one does not even have a propensity to engage in homosexual acts. *See* S. Rep. No. 112 at 294 ("[O]nce the government introduces evidence that the member has stated that he or she is a homosexual, the burden shifts to the member . . . to demonstrate that he or she is not a homosexual as defined in the statute."); *id.* ("[T]he member bears the burden of persuading the fact-finder by a preponderance of the evidence that the rebuttal is more credible than the original statement (*e.g.*, by proving that the original statement was made in jest).").[5/] The statute in this manner bars service not just of those individuals likely to engage in homosexual acts, but rather, of all acknowledged (or otherwise known) homosexuals. That the statute is aimed at known homosexuals, rather than homosexual acts, is further confirmed by the fact that, pursuant to section 654(b)(1), a heterosexual who actually engages in homosexual acts is not barred from service if he demonstrates *inter alia* that he is not a homosexual.[6/]

In barring all known homosexuals from military service, the statute is identical to the pre-1993 DoD policy:

[5/] *See also* Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103rd Cong., 1st Sess. 753 (1993) (S. Hrg. 103-845) (testimony of Secretary Aspin) ("The point of rebuttable presumption is that if the issue comes to the attention of the authorities and the authorities say you have just said you are gay, you have the opportunity to present some evidence to the contrary."); *id.* at 746 (Secretary Aspin answering "Correct" to Senator Bryan's query: "So, the rebuttable presumption is a rebuttable presumption that the individual then, in effect, would carry the burden of establishing that he or she was not homosexual?").

[6/] Of course, a heterosexual would be subject to discharge under Article 125 of the U.C.M.J., 10 U.S.C. § 925, if the homosexual act he commits is sodomy.

> Homosexuality is incompatible with military service.. . . A member shall be separated . . . if . . . [t]he member has stated that he or she is a homosexual or bisexual unless . . . the member is not a homosexual or bisexual.

DoD Directive 1332.14 (March 9, 1982), *reprinted in* 32 C.F.R. Ch. 1, Pt. 41, App. A, ¶¶ H.1.a. and H.1.c.(2) (1994). Indeed, in the following colloquy with Senator Nunn during the Senate hearings on the "Don't Ask; Don't Tell" policy, the General Counsel for the Department of Defense, Jamie Gorelick, confirmed that the current policy is the same as the prior policy in this critical respect:

> CHAIRMAN NUNN. Under [the pre-1993] DoD policy, if there is a finding that an individual has stated that he or she is homosexual, that person is discharged *unless there is further finding that the individual is not, in fact, homosexual*, that is, the person does not engage in homosexual acts or have an intent or desire to do so. Is that correct?
>
> MS. GORELICK. That is correct.
>
> . . .
>
> CHAIRMAN NUNN. In other words, the [pre-1993] policy establishes a rebuttable presumption that a person who says he or she is homosexual is, in fact, homosexual. Is that correct?
>
> MS. GORELICK. That is what the current policy does. And, as the Secretary says, *that is carried forward into the new policy*.

S. Hrg. 103-845 at 771 (emphasis added). Secretary Aspin also affirmed that the policy disqualifies from service all

known homosexuals, agreeing in response to questions from Senator Gramm that, under the policy, military personnel "would at least be assured that no one would be a self-professed homosexual and be allowed to continue to serve." *Id.* at 727; *see also id.* at 746-47 (Secretary Aspin confirming that the rebuttable presumption in the current policy is the same as that in the prior policy).

The fact that the statute excludes known homosexuals from service because they are homosexual and not only because they engage in homosexual acts is reinforced in the statutory findings made by Congress:

> The *presence* in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts [-- that is, of "homosexuals," as statutorily defined --] would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a)(15) (emphasis added); *see also* S. Rep. No. 112 at 293 ("The [legislative] findings reflect long standing Department of Defense policy, as set forth in [the pre-1993] DoD Directive[s], that '[h]omosexuality is incompatible with military service . . . [because the] presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.'"); H.R. Rep. No. 200, 103d Cong., 1st Sess. 287 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 2013, 2074 ("[T]he committee concludes that homosexuality is incompatible with

military service.").[7/]

And there is abundant support for this statutory finding in the legislative record. *See*, *e.g.*, S. Rep. No. 112 at 278 (testimony of General Colin Powell); *id.* at 280 (testimony of General H. Norman Schwarzkopf); S. Hrg. 103-845 at 780 (testimony of General John Otjen); MWG Summary Report at 5; *see generally Able*, 880 F. Supp. at 977 (describing the disruptive effect to unit cohesiveness caused by the mere presence of homosexuals in the military as"a theme repeatedly stated by high-ranking officers").

Thus, the "Don't Ask; Don't Tell" policy enacted into law, as opposed to the policy that has been put in place by the Administration, is not conduct-based in the constitutionally significant sense that homosexuals may only be discharged based upon their commission of homosexual acts or their likelihood to commit such acts, or even in the sense that its purpose is to prevent homosexual conduct before it occurs. As Lt. Thomasson correctly observes, this"focus on conduct [is but] a lawyer-driven, pretextual afterthought" by the Administration. Appellant's Br. at 26; *see also Able*, 880 F. Supp. at 977 ("[T]he lawyers evolved the Byzantine and complex [regulatory] provisions" in order "to pretend that the

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[7/] *See also* Memorandum for the President from Attorney General Janet Reno, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces 1 (July 19, 1993), *reprinted in* S. Hrg. 103-845 at 706 ("The policy reiterates the prior Defense Department view that 'homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness.'"); Appellant's Br. at 26 ("[T]he long history of the policy -- including even the recent legislative history surrounding the [1993] Act -- establishes beyond any doubt that the chief concern among policymakers has always been to combat the mere *presence* of homosexuals in the ranks." (citing, *inter alia*, *Able* v. *United States*, 880 F. Supp. 968, 976-80 (E.D.N.Y. 1995))).

concern was [not over] the mere presence of homosexuals in the Services, but [over] their potential acts."). *Compare* Gov't Br. at 23 ("Thomasson's repeated assertion that the policy classifies on the basis of homosexual orientation cannot be reconciled with the plain *regulatory* language that equates 'propensity' with 'likelihood.'" (citations omitted) (emphasis added)).

The statutory policy is "conduct-based" (if it can be so characterized at all) only in the sense that the service member must *evidence* his homosexual propensity in some manner, if only by a statement, before he will be discharged. *See* DoD Directive 1332.30, Encl. 1, ¶ 9, Encl. 2, ¶ C, and Encl. 6, ¶ B.4 (March 4, 1994) (defining "homosexual conduct" so as to include "statements"); MWG Summary Report at 4 (same); S. Rep. No. 112 at 289 (same); *see also* S. Hrg. 103-845 at 817 (testimony of Jamie Gorelick) ("[W]hen we talk about separating status from conduct, we are talking about separating orientation from homosexual acts, *statements*, and marriages." (emphasis added)); *id.* at 807 (testimony of Jamie Gorelick) ("[T]he policy has always been defended on the basis that it is homosexual conduct -- acts, *statements*, and marriages -- that is the basis of discharge under the current policy." (emphasis added)). Such a policy is, as between pure status and pure conduct, a status-based policy, because it merely recognizes certain conduct as evidence of homosexuality; it does not exclude on the basis of that conduct itself. To say that the policy is status-based in this sense, as opposed to conduct-based in the sense argued by the Administration, of course, is not to say that the policy is status-based in the same way that an exclusion on the basis of an immutable characteristic would be. Rather, it is to say that the policy is based upon what is in fact a hybrid of status and conduct, namely, "propensity." "Propensity" is different from a predetermined and immutable characteristic like race or sex, in that it is a disposition toward certain conduct; but it is also

different from conduct itself, or its likelihood, because it is neither itself action nor necessarily indicative of likely future action. It is, as commonly understood, merely an inclination, *see infra*, and it is that inclination, that propensity, not any likelihood of conduct, at which this particular policy is directed.

That the enacted policy is conduct-based only in the sense that there must be some manifestation of one's homosexuality should not be surprising. The whole of the compromise between the Congress and the President was that the military would no longer question a new recruit or service member about his sexual orientation absent some manifestation by him of homosexuality, but that discharge would be mandated if a service member evidenced his homosexuality in any way at all -- through even as little as a statement -- unless he could prove that he was not homosexual. Thus, the policy: "Don't Ask, Don't Tell."

B.

The Administration fully understands that the policy enacted by Congress is not conduct-based in the sense that it is targeted at homosexual acts and the likelihood that one will commit such acts, as evidenced by its repeated mischaracterization of the statute itself and its effective misquotation of the testimony of the various witnesses and legislators on this important if not dispositive issue. On virtually every occasion when the Administration references either a statutory provision or a passage from testimony wherein Congress or a witness observed that the presence of open homosexuals would be detrimental to combat capability or unit cohesion, it substitutes its regulatory definition of "propensity" (*i.e.*, a likelihood that one will engage in homosexual acts) for the words actually enacted or spoken.

The Administration states, for example, that,

> [t]he classification here is directed at homosexual "acts and the likelihood of acts" and *is grounded in the congressional finding that the presence in the military of persons who engage in, or are likely to engage in, such acts*"would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. 654(a)(15).

Gov't Br. at 16-17 (emphasis added). In fact, the statutory finding referenced by the Administration in this passage is not that an unacceptable risk would be created by the presence of persons likely to engage in homosexual acts; rather, the finding is that the risk would be created by "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts." 10 U.S.C. § 654(a)(15).

Similarly, the Administration describes General Powell's Senate testimony in this way:

> In General Powell's experience, *service by persons who engage in, or are likely to engage in, homosexual acts*,"would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. 112 at 278. *See also id.* at 281.

Gov't Br. at 37 (emphasis added); *see also id.* at 3 (same). General Powell actually stated not that the service of persons likely to engage in homosexual acts would be detrimental to unit cohesion, but rather that,

> *the presence of open homosexuality* would have an unacceptable detrimental and disruptive impact on the

cohesion, morale, and esprit of the armed forces.

S. Rep. No. 112 at 278 (emphasis added).

Repeating the mischaracterization, the Administration recites again, later, that "General Powell stated that 'it would be prejudicial to good order and discipline' if the military required heterosexuals *and persons who do, or are likely to, engage in homosexual acts* 'to share the most private facilities together, the bedroom, the barracks, latrines, and showers.'" Gov't Br. at 38 (quoting from S. Rep. No. 112 at 283) (emphasis added). General Powell actually stated:

> [I]t is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of *individuals* who are proud, brave, loyal, good Americans, but *who favor a homosexual life style*, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers.
>
> I think that it is a very difficult problem to give the military. I think it would be prejudicial to good order and discipline to try to integrate *that* in the current military structure.

S. Rep. No. 112 at 283 (emphasis added); *see also* Appellant's Reply Br. at 13 ("[The government has] simply and repeatedly misrepresented General Powell's testimony in an effort to suggest [that the policy is based on conduct, not on mere acknowledgements of sexual orientation, irrespective of conduct].").

The Administration misrepresents General Schwarzkopf's testimony in the same manner. It apprises the court that,

> General Schwarzkopf similarly testified, based on his consistent experience over years of military service, that the presence of *such* homosexuals [viz., "persons who engage in, or are likely to engage in, homosexual acts"] in a military unit "polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." [S. Rep. 112] at 280.

Gov't Br. at 37 (emphasis added). General Schwarzkopf actually stated:

> [I]n my years of military service, I have experienced the fact that the introduction of an *open homosexual* into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.

S. Rep. No. 112 at 280 (emphasis added).

Likewise, the Solicitor General says that General Schwarzkopf testified that, "where *such* homosexuals [again, those who either engage in or are likely to engage in homosexual acts] served in military units, 'morale broke down, and unit effectiveness suffered,'" Gov't Br. at 37 (emphasis added), when in fact General Schwarzkopf testified that, "in every case [he was] familiar with, . . . *whenever it became known in a unit that someone was openly homosexual*, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered." S. Rep. No. 112 at 280 (emphasis added).

Such mischaracterization appears repeatedly throughout the government's submissions.

It is self-evident that this mischaracterization is purposeful. The deliberateness of the mischaracterization is also borne out, however, by the fact that when the Administration responded to congressional leaders whom it knew to be opposed to its position on military service by homosexuals, *it substituted the statutory language for the regulatory language, rather than the regulatory language for the statutory language as it does before this court*. Senators Thurmond, Nunn and Coats, on behalf of the Senate's Committee on Armed Services, asked the Department's General Counsel "[h]ow . . . the implementing directives and related guidance address . . . [t]he circumstances in which a person who states that he or she is a homosexual claims that the rules preclude separation of anyone based on their 'sexual orientation.'" Letter from DoD General Counsel Judith A. Miller to Senators Thurmond, Nunn and Coats 1, 2 (July 27, 1995) (reciting questions from Thurmond, Nunn and Coats letter of July 13, 1995). When DoD answered this question, it did so with what is almost a verbatim quotation from its regulation, altered only so as to substitute the statutory language for the final clause of the regulation, which refers to the possibility of rebuttal through proof that one is not *likely* to engage in homosexual acts. The regulation provides, of course, that,

> [i]n determining whether a member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered: (a) Whether the member has engaged in homosexual acts; (b) The member's credibility; (c) Testimony from others about the member's past conduct, character and credibility; (d) The nature and circumstances of the member's statement; [and] (e) *Any other evidence relevant to whether the member is likely to engage in homosexual acts*.

DoD Directive 1332.14, Enc. 3, Att. 1, ¶ H.1.b.(2) (March 4, 1994) (emphasis added). The Department of Defense General Counsel, however, replied to the Senators as follows:

> In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other evidence: whether the member has engaged in homosexual acts; the member's credibility; testimony from others about the member's past conduct, character and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member engages in, attempts to engage in, *has a propensity to engage in*, or intends to engage in homosexual acts.

Letter from DoD General Counsel Judith A. Miller to Senators Thurmond, Nunn and Coats 3 (July 27, 1995) (emphasis added).

III.

Despite Congress' clear mandate requiring the discharge of all known homosexuals, the Department of Defense has, by its regulatory redefinition of the statutory term "propensity," created what is in effect a sanctuary for known homosexuals whom the military determines are not *likely* to engage in homosexual acts. *See* Gov't Br. at 27 ("Both on the face of the policy and in actual practice, the rebuttable presumption allows a service member who has stated that he is homosexual an opportunity to be retained in the service by showing that he does not engage in, and is not likely to engage in, homosexual

acts.").[8/] Because it is unmistakable that, under the statute enacted by Congress, such homosexuals may not remain in service of the military, I would invalidate this regulation as an impermissible exercise of the regulatory authority conferred upon the Secretary.

A.

The regulation promulgated by the Secretary defines the statutory phrase "propensity to engage in homosexual acts" to mean "a likelihood" that one will engage in homosexual acts:

[8/] The Solicitor General contends that there is a difference between a homosexual "orientation" and a homosexual "propensity" insofar as the likelihood that one will engage in homosexual acts is concerned, a difference the Administration has incorporated into its regulatory definition of "orientation." *See* DoD Directive No. 1332.30, Encl. 1, ¶ 16 (March 4, 1994) (defining "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts"). I do not know what homosexual orientation is, if it is not the propensity to commit homosexual acts; indeed, I do not understand how one even knows that he has a homosexual orientation except by realizing that he has a propensity toward the commission of homosexual acts. *See Able*, 880 F. Supp. at 975 (characterizing the distinction between "orientation" and "propensity" as "Orwellian"). But if there are indeed persons who are homosexually oriented but do not have a homosexual propensity, I would agree that the statute does not require their discharge, at least under the statements provision. I would also agree that if, as Deputy Attorney General Gorelick testified, a homosexually-oriented person is merely an undetected homosexual, the statute accepts the continued service of such persons as a consequence of the compromise that service members would not be asked about their sexual orientation. *See* S. Hrg. 103-845 at 808 (Gorelick testimony); *see also* Memorandum for the President from Attorney General Janet Reno, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces 1 (July 19, 1993), *reprinted in* S. Hrg. 103-845 at 706 ("[H]omosexual conduct (but not an unmanifested orientation) would be grounds for separation from service.").

> Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates *a likelihood* that a person engages in or will engage in homosexual acts.

DoD Directives 1332.30, Enc. 1, ¶ 13 (March 4, 1994) (emphasis added).[2/] By so defining "propensity," the Secretary has, contrary to the clear intent of the Congress, effectively transformed a provision that permits rebuttal of the presumption of homosexuality only by proof that one is not a member of the class (*i.e.*, not a homosexual), into a provision that permits individualized rebuttal of the presumption merely by proof that one is not likely to engage in homosexual acts.

Quite obviously, "propensity" does not mean "a likelihood," and it certainly does not mean, as the Administration maintains, "likely"; nor can the term reasonably be defined in either of these ways. As common sense suggests, "propensity" is merely "a natural inclination" or an "innate or inherent tendency." *Webster's Third New Int'l Dictionary, Unabridged* 1817 (1986); *see also The Oxford English Dictionary* 637 (2d ed. 1989) (defining "propensity" as "disposition or inclination to some action, course of action, [or] habit"); *The American Heritage Dictionary* 1452 (3d ed. 1992) (defining "propensity" as "an innate inclination; a tendency"); *Able*, 880 F. Supp. at 975 ("'[P]ropensity' is generally understood and defined to mean a 'natural inclination' or an 'innate or inherent tendency.'"). *Compare Oxford English Dictionary* at 345 (defining "homosexual" as

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[2/] *See also* DoD Directive 1332.30, Enc. 2, ¶ C (March 4, 1994) ("A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.").

a "[a] person who has a sexual *propensity* for his or her own sex" (emphasis added)); *Webster's Dictionary* at 1085 (defining "homosexual" as "one who is *inclined* toward or practices homosexuality" (emphasis added)). The Department of Justice itself argued for a definition of "propensity" as "inclination" before the Ninth Circuit, in the case that apparently serves as the Administration's model for its policy. *See* Gov't Br. at 23 n.8, *Meinhold* v. *United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (No. 93-55242) ("[P]ropensity" is "an 'often intense natural inclination.'" (citing *Webster's New Collegiate Dictionary* 943 (9th ed. 1990))).

The Solicitor General's twin responses to this common understanding of the term "propensity" are themselves testament to the indefensibility of the position he defends. First, he notes that the dictionary includes the word "propensity" in the synonymy for the word "leaning," and, therein, in distinguishing "propensity" from "leaning," suggests that the word "propensity" "may apply to an innate or deeply engrained longing or attraction making a certain course of action highly probable." *See* Gov't Supp. Br. at 4 (quoting *Webster's Dictionary* at 1286 (definition of "leaning")). This entry does not in any way suggest, contrary to the Solicitor General's belief, that "propensity" is synonymous with "likely"; it suggests only that "propensity" may refer to an innate longing or attraction, *which in turn* may render certain action more likely -- and, at that, the entry only indicates that "propensity" *may* refer to such an innate longing or attraction, not that it need so refer or even that it ordinarily does in common usage. If anything, the significance of this entry is not that it suggests a possible distinction between "propensity" and "leaning," but that it includes "propensity" *as a synonym of "leaning,"* which it defines, as it does "propensity," as an "inclination." The interchangeability of "propensity," "inclination," and

"leaning" all but confirms that "propensity" cannot be defined as "a likelihood," as the regulation purports to do.

Second, the Solicitor General combs from the United States Reports two examples of use of the word "propensity," which he claims support his equation of that term with "likely." *See* Gov't Supp. Br. at 4. Apart from the general irrelevancy of this enterprise, neither of the examples supports the regulatory definition he seeks to justify. The Court in *Michelson* v. *United States*, 335 U.S. 469, 475 (1948), clearly used the word "propensity" to mean "inclination" or "predisposition," not, as the Solicitor General seems to believe, "likely." And although Justice Blackmun (joined by Justice Stevens), in *Ballew* v. *Georgia*, 435 U.S. 223, 235 (1978), did use the words "propensity" and "likelihood" interchangeably in discussing the conviction rates for juries comprised of different numbers of jurors, he did not use either word to mean "likely," as the Department of Defense regulation and implementing interpretations use the phrase "a likelihood."

If resort to caselaw is to be had, even a cursory review reveals that the weight of even arguably relevant authority is that the word "propensity" means merely an "inclination," precisely the definition the dictionaries ascribe to the term. *See*, *e.g.*, *Robinson* v. *California*, 370 U.S. 660, 678-79 (1962) (Harlan, J., concurring) ("Since addiction alone cannot reasonably be thought to amount to more than a compelling *propensity* to use narcotics, the effect of this instruction was to authorize criminal punishment for a *bare desire* to commit a criminal act." (emphasis added)); *Powell* v. *Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("Punishment for a *status* is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a *mere propensity*, a *desire* to commit an offense . . . ." (emphasis added)).

There is simply no credible argument that in common usage "propensity" means "likely"; any argument that it does is sophism. There certainly is no argument that the very Congress that refused to lift the long-time ban on homosexuals in the military and insisted that service members be discharged even for statements that they were homosexual would have regarded these terms as equivalent. For to define the term "propensity" as "likely" is "to create . . . a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct," the very circumstance the Congress concluded would be "inimical to unit cohesion, morale, welfare and discipline, unenforceable in the field, and open to legal challenge." H.R. Rep. No. 200, 103d Cong., 1st Sess. 289 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 2013, 2076.

B.

When the regulation was announced, the Secretary attempted to justify it on the ground that the substitution of the statutory term "propensity" for the term "desire," which appeared in the pre-1993 DoD Directive,[10/] fundamentally changed the policy from one requiring the discharge of all homosexuals to one requiring the discharge only of those homosexuals likely to engage in homosexual acts. *See* J.A. at 338-39 (Secretary Aspin news conference) ("[W]e've eliminated the word 'desire' to emphasize that the statement

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[10/] The statute now defines "homosexual" as "a person, regardless of sex, who engages in, attempts to engage in, has a *propensity* to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.'" 10 U.S.C. § 654(f)(1) (emphasis added). The pre-1993 Directive defined "homosexual" as "a person, regardless of sex, who engages in, *desires* to engage in, or intends to engage in homosexual acts." DoD Directive 1332.14 (March 9, 1982), *reprinted in* 32 C.F.R. Ch. 1, Pt. 41, App. A, ¶ H.1.b.(1) (1994) (emphasis added).

must be one that shows a likelihood to engage in acts."). The change of the word "desire" in the pre-1993 Directive to the statutory term "propensity" was regarded by Congress, however, as only a "minor drafting clarification" never intended to "affect the practical effect of the policy," S. Rep. No. 112 at 289-90, as the Deputy Attorney General herself observed at the time, *see id.* at 290.

Although noting that the change was not intended to have any "practical effect," the committee did, as well, refer to the drafting change as a "useful clarification." *Id.* Seizing upon this observation, the Solicitor General argues that the usefulness of the change was in its clarification that the focus of the new policy, like the prior policy, is on the likelihood of future homosexual acts, not merely on homosexuality. This argument is plausible, however, only if one accepts the Solicitor's mistaken premise that the prior policy was itself concerned only with homosexual acts; but if one appreciates that the prior policy was clearly status-based, as I believe the Solicitor must, *see* Gov't Supp. Br. at 6 (noting that committee viewed change as "useful," but omitting any reference to committee statements that change was not to have any practical effect), then it can hardly be maintained that a change which fundamentally altered the policy to one that was entirely conduct-based was merely a "minor drafting clarification" never intended to "affect the practical effect of the policy."

Considering that the prior policy was unmistakably addressed to homosexuality *per se*, rather than the likelihood of conduct, and considering that the Administration had nonetheless argued, by equating "desire" with "a likelihood of

future conduct,"[11] that the prior policy was addressed to conduct, it is, if anything, more believable that Congress thought the clarification "useful" as a reiteration that the policy required exclusion of all homosexuals, not only those who are likely to engage in homosexual conduct. That is, it may well be that Congress concluded that, because propensity connotes neither volition nor longing, this term would not be as susceptible to the Administration's transmogrifications as "desire" had proven to be.[12]

C.

The Solicitor General attempts to defend the regulation on the grounds both that it is a reasonable interpretation of an ambiguous statute and that it was necessary to remedy the constitutional infirmity of the statute. Neither of these asserted justifications is sufficient to uphold the regulation.

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[11] *See, e.g.*, Gov't Br. at 10 (July 30, 1993), *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (No. 93-55242) ("The regulatory language, DoD's reasonable interpretation, and judicial precedent make plain that the [pre-1993] policy targets members who have engaged or . . . will likely engage in homosexual conduct. The policy targets homosexual 'conduct -- past, present, and future, but conduct nonetheless.'" (citing *Watkins* v. *United States Army*, 847 F.2d 1329, 1362 (9th Cir. 1988) (Reinhardt, J., dissenting))); *cf. Steffan* v. *Perry*, 41 F.3d 677, 687 n.7 (D.C. Cir. 1994) (*en banc*) ("The Ninth Circuit [in *Meinhold*] construed the 'desires' language to mean something akin to intent.").

[12] *Compare Webster's Dictionary* at 612 (defining "desire" as "1 : conscious impulse toward an object or experience that promises enjoyment or satisfaction in its attainment . . . 2 a : an enduring and passionate longing or intense yearning : an urgently impelling motive toward attainment : CRAVING, APPETENCY . . . b(1) : a strong physical inclination (2) : erotic urge : sexual attraction or appetite . . . c : a striving after in intent : a deliberate choice or preference") *with id.* at 1817 (defining "propensity" as "a natural inclination : innate or inherent tendency").

The Solicitor General first asserts that even if "propensity" does not mean "a likelihood" of future conduct, the agency's definition is nonetheless entitled to deference as a reasonable interpretation by the agency charged with the statute's administration. This is not, however, an instance where deference to an agency's regulatory interpretation of a statute is appropriate: Because the statute unambiguously requires the discharge of all known homosexuals, a regulation that limits discharge to only those known homosexuals who are likely to engage in homosexual acts is *per se* unreasonable. Nor, given that the President does not attempt to defend the regulatory modification on the ground it is needed in the interest of national security, is this a case where the Executive must be afforded deference, despite contrary congressional action, because of the President's preeminent role in matters of national security, *see* U.S. Const. Art. II, § 2; *cf. United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). This is, rather, the archetype of the case described by Justice Jackson, where "the President takes measures incompatible with the expressed or implied will of Congress, [and] his power is [therefore] at its lowest ebb, for . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983) ("The Framers of the Constitution . . . explicit[ly] grant[ed] plenary authority to Congress 'To raise and support Armies'; 'To provide and maintain a Navy'; and 'To make Rules for the Government and Regulation of the land and naval Forces.'" (quoting U.S. Const. Art. I, § 8, cls. 12-14)); *Weiss* v. *United States*, 114 S. Ct. 752, 760-61 (1994) ("Judicial deference . . . is at its apogee when reviewing congressional decisionmaking in [the military context]. . . . Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." (internal

quotations omitted)).

The Solicitor General also attempts to defend the regulation on the grounds that it was necessary to avoid a question of the statute's constitutionality,[13] and is, for that reason, permissible. However, an agency of unelected officials has no authority to alter the plain commands of the Congress simply because, in its view, questions exist as to the constitutional validity of a such a statute. *Cf. Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2282-83 (1993) ("[I]n a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988))). This is especially true where, as here, Congress explicitly considered, at length, the constitutional validity of its action, and concluded that it was well within its constitutional authority. *See* Gov't Br. at 20 ("Congress specifically concluded that the new policy does 'not violate the constitutional rights of [homosexuals].'" (quoting S. Rep. No. 112 at 284)).

D.

The Administration vehemently argues, and Lt.

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[13] *See* Gov't Br. at 23-24 ("[T]o the extent that the military's reasonable construction of the term 'propensity' avoided a serious question regarding the constitutionality of this statutory provision, the district court was all the more required to defer to that construction." (citing *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2282-83 (1993))); *see also id.* at 16 (arguing against strict scrutiny because "[t]he classification here is directed at homosexual 'acts and the likelihood of acts'").

Thomasson on occasion agrees, that the validity of the regulation is not before the court and should under no circumstance be addressed by the court. *See*, *e.g.*, Gov't Supp. Br. at 3.[14/] These protestations are to be expected, but they are unavailing. Lt. Thomasson makes two separate arguments in challenging the military's policy, not one. The first, which the majority ably addresses, is that the policy, defined collectively by the statute and the regulation, is unconstitutional because it irrationally presumes prohibited conduct from a mere statement of status. The second, which the majority does not address, is that the military's policy is wholly status-based because the conduct-based regulation is invalid under the statute, and, without the regulation, the statute unconstitutionally authorizes the discharge of homosexuals solely on the basis of their status as homosexuals.

The Administration defends against Thomasson's argument that the policy is status-based entirely on the ground that the policy is conduct-based *by virtue of the regulatory*

[14/] Lt. Thomasson does, at times, purport not to challenge the regulation. *See*, *e.g.*, Appellant's Rule 28(f) Supp. Mem. at 12 (merely noting that an argument raised by *amicus curiae* is not necessarily before the court); *id.* at 2, 5. ***But see*** Appellant's Resp. to Mot. of *Amicus Curiae* Family Research Council for Leave to Participate in Oral Argument at 2 & n.1 (expressly representing that he challenges validity of regulation). He does so, however, for what I regard as the same transparent reasons that underlie the Solicitor General's entreaties that the regulation is not before us. Although Lt. Thomasson recognizes that he must challenge the regulation in order to challenge the statute's exclusion of homosexuals on grounds of status, he nevertheless prefers, should the statute be upheld, that the regulation remain intact because of the sanctuary it creates. Under these circumstances, to acquiesce in the collaborative argument by the parties that we should not address the validity of the regulation would, in my judgment, be to allow ourselves, as judges, to be used as pawns in a political game between players with only putatively different interests.

definition of the statutory term "propensity."[15] Lt. Thomasson responds that, to the extent this is so, the regulation is but "lawyerly afterthought" and "definitional trickery." Appellant's Br. at 26; Appellant's Reply Br. at 19. This is necessarily to draw into question the validity of the regulation.[16] Otherwise, Lt. Thomasson's argument that the

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[15] *See, e.g.*, Gov't Br. at 11 ("The legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection."); *id.* ("[T]he Government has a legitimate interest in prohibiting homosexual acts in the military. To avoid the risk to military effectiveness posed by such acts, Congress enacted a classification that reasonably presumes -- subject to rebuttal by the service member -- that a member who states that he is a homosexual is likely to act consistently with his sexuality and engage in prohibited homosexual acts."); *id.* at 12 ("Thomasson's claim that the statute violates the First Amendment also lacks merit. . . . The new policy treats a service member's statement of homosexuality as a basis from which to presume, in the absence of rebuttal by the member, that he engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statements."); *id.* at 13 ("Thomasson argues (Br. at 34) that heightened scrutiny should apply because the policy is directed, he contends, at 'sexual orientation.' As we show *infra*, pp. 22-24, however, this argument fundamentally misapprehends the relevant classification, which the district court correctly held is directed at homosexual 'acts and the likelihood of acts.'"); *id.* at 22 ("The Directives equally make clear that the new policy is conduct-directed and does not target orientation."); *id.* at 23 ("Thomasson's repeated assertion, (*e.g.*, Br. 24, 33-37) that the policy classifies on the basis of homosexual orientation cannot be reconciled with the plain *regulatory* language that equates 'propensity' with 'likelihood.'" (emphasis added)).

[16] *Reno* v. *Koray*, 115 S. Ct. 2021, 2024 n.2 (1995), urged upon us by both the government and Lt. Thomasson as authority against our consideration of the validity of the regulation, does not in any way suggest that we should abstain from consideration of this question. In that case, unlike in that *sub judice*, the plaintiff had abandoned his constitutional argument altogether.

policy is entirely status-based is patently specious, because, as the Administration notes, it is contradicted by "the plain regulatory language." Gov't Br. at 23.

IV.

Because I would invalidate the regulation, I must address whether the statute's mandatory exclusion of known homosexuals is constitutionally permissible. Under rational basis review, this exclusion must be sustained if both of the distinctions implicit in the statute -- that between homosexuals and heterosexuals and that between known and undetected homosexuals -- are rationally related to a legitimate governmental interest. *Heller* v. *Doe*, 113 S. Ct. 2637, 2642 (1993).

Although not required under rational basis review, *see id.* at 2643 ("[The Government] has no obligation to produce evidence to sustain the rationality" of the Act; "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."), Congress made legislative findings more than sufficient to demonstrate that the exclusion of known homosexuals from military service both serves a legitimate governmental interest and is rationally related to that interest.

Congress concluded, in findings that are fully supported in the legislative record, *see*, *e.g.*, S. Rep. No. 112 at 274-75 (recounting General Schwarzkopf's testimony that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield"), that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion," 10 U.S.C. § 654(a)(6), and that "unit cohesion," defined as "the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the

combat effectiveness of the individual unit members," was "[o]ne of the most critical elements in combat capability," *id.* at § 654(a)(7). It cannot be gainsaid that the development and preservation of unit cohesiveness essential to combat capability is a legitimate -- indeed, compelling -- governmental interest.

Nor can it be successfully maintained that the exclusion of known homosexuals because of the effect that their manifested sexual attraction for members of the same sex has on unit cohesion does not satisfy the minimal requirement that the exclusion rationally further the government's legitimate interest in preserving unit cohesiveness.[17/] In assessing the rationality of the relationship between Congress' objective and its means, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it," *see Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976), and the burden is on he who challenges the governmental action "to negative every conceivable basis which might support it," *Heller*, 113 S. Ct. at 2643.

Here, the Congress of the United States expressly found that "[t]he presence in the armed forces [of homosexuals, as statutorily defined] would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15); *see also* S. Rep. No. 112 at 289 ("The July 19 Memorandum carries forward longstanding Department of Defense policy[;] . . . [it] makes it clear that the mandatory discharge policy is necessary because such

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[17/] Obviously it is this propensity, this attraction for members of the same sex, that, at once, renders permissible the military's exclusion of homosexuals in order to preserve unit cohesion and also distinguishes the ban on homosexuals from what would be an emphatically impermissible policy of excluding service members based upon, for example, race.

matters interfere 'with the factors critical to combat effectiveness, including unit morale, unit cohesion, and individual privacy.'"). This finding is in turn supported by, *inter alia*, the unequivocal testimony of our military leaders, testimony which bears repeating. As General Powell testified,

> the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.
>
> . . .
>
> . . . [O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Id. at 278, 281. And as General Schwarzkopf, who shared General Powell's belief, testified:

> [I]n my years of military service, I have experienced the fact that the introduction of an *open homosexual* into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . . .

Id. at 280 (emphasis added); *see also* S. Hrg. 103-845 at 780 (testimony of Gen. Otjen) ("[W]hen somebody identifies themselves as a homosexual . . . that is disruptive to unit cohesion."); Appellant's Br. at 26 n.25 ("The so-called 'privacy' and 'sexual tension' rationales -- which are variations on the 'unit cohesion' theme, . . . if valid at all,

arise from the mere presence of homosexuals [in the military].").

Given Congress' conclusion that the mere presence of known homosexuals in the military undermines unit cohesiveness, the statutory ban on service by such persons is not just rationally related to the end of unit cohesiveness, it is narrowly tailored to achievement of that end. In fact, it is more narrowly-tailored to that end than was the policy embodied in the pre-1993 Directives, which, by allowing questioning of recruits about their sexual orientation and investigations into the homosexual propensities of service members, sought to ferret out even unknown homosexuals in order to discharge them from military service. The policy therefore would pass constitutional muster even under heightened or strict scrutiny; it certainly passes under the rational basis review applicable to the classifications at issue in this case,[18/] as courts repeatedly held under the previous Directive, *see, e.g.*, *Steffan* v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*); *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *cf. Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989) (upholding military's pre-1982 exclusion of homosexuals), *cert. denied*, 494 U.S. 1003 (1990); *Rich* v. *Secretary of the Army*, 735

[18/] *Jacobson* v. *United States*, 503 U.S. 540, 551-52 (1992), and *Robinson* v. *California*, 370 U.S. 660, 667 (1962), which held unconstitutional the criminal punishment of individuals based upon a presumption of action from mere status or predisposition, do not dictate otherwise. Discharge from military service is not "punishment," as the District of Columbia Circuit observed in *Steffan*, 41 F.3d at 687. *See also* Gov't Br. at 30 ("*Jacobson* was a criminal prosecution, which involves restrictions not applicable to military personnel decisions."). In any event, the statute as written does not presume likely conduct from status, but merely homosexual propensity (that is, inclination or attraction) from a statement or other manifestation of homosexuality.

F.2d 1220 (10th Cir. 1984) (upholding pre-1982 exclusion even were heightened scrutiny applicable); *but see Meinhold* v. *United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (interpreting the prior policy as "conduct-based" because the ban on status raises constitutional problems), and as the Solicitor General candidly acknowledged before this court.[19/]

[19/] THE COURT: *Does the United States believe that if this regulation permits the discharge of someone who is homosexual, irrespective of conduct, then the regulation is invalid*?

COUNSEL: *No*.

THE COURT: *So in other words . . . [t]he military and Congress can provide for the discharge of any individual who is homosexual in the view of the Department of Justice; is that correct, Mr. Kneedler*?

COUNSEL: Well, this case does not present that.

THE COURT: I understand that.

. . .

COUNSEL: And that yes, in the sense that the-- that the military is entitled to make a judgment that an expression . . . that one is homosexual has a correlation at least, as the D.C. Circuit said in *Steffan*, a correlation that that --

THE COURT: My question is: Suppose there's no correlation. Irrespective of conduct, may the military discharge homosexuals in the view of the Department of Justice constitutionally?

COUNSEL: That would present -- That would present a more difficult question. We acknowledge that --

THE COURT: Does the United States have a position on that? Because in my view that's what Congress intends. And the question is whether the executive branch has attempted to circumvent that through the regulations. So I may have to face that question, and I need the Department's view on

(continued...)

V.

Because the Administration's policy regarding homosexuals in the military, implemented through regulation, is fundamentally different than the statute enacted by the Congress and signed into law, I would invalidate that policy as contrary to statutory mandate. I would, however, uphold the policy against military service by known homosexuals that was actually enacted into law by the Congress of the United States, as a permissible exercise of the Legislature's plenary authority to prescribe regulations for the military.

Judges Russell, Widener, Wilkins, Hamilton and Williams join in this opinion.

HALL, Circuit Judge, dissenting:

Before I explain why I would reverse the judgment of the district court, I must comment on the extended discussion of the military context of this case in the majority opinion.

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[19](...continued)
that.

. . .

THE COURT: Does the United States have a position on the question I asked; or does it not? It may not. I'm just asking.

COUNSEL: *We believe that such a policy would be constitutional. But we acknowledge that because of the overriding needs of the military, we believe that such a policy would be constitutional.*

Transcript of Oral Argument, Sept. 12, 1995, at 44-47 (emphasis added).

I recognize that our duty in weighing the constitutionality of a statute is "'grave[ ] and most delicate,'" and I do not propose to "'lightly second-guess'" any decision of Congress or of the President.[1/] Though the delicacy of the situation stems from the respect we owe the legislature and executive, the gravity inheres in our duty to defend the Constitution against the trespasses of those branches, no matter how carefully or pedantically they be constructed, and notwithstanding their popularity. The Founders gave us lifetime tenure to assure that we would not shrink from that duty.[2/]

Likewise, though raising the armies and commanding them are the exclusive tasks of the Congress and President, we have a role -- a vital one -- in ensuring that the military remains submissive to the Constitution and civil authority. We have now had a large standing army for half a century, and the Republic has endured. In the annals of history, our

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1/ *See supra* at 10 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 251 (1990)).

2/ As Alexander Hamilton argued at the time:

> Considerate men of every description ought to prize whatever will tend to beget or fortify that temper [independence] in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.
>
> . . .
>
> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

Federalist No. 78 (Hamilton), at 470-471 (Rossiter ed. 1961).

experience must be counted as the exception rather than the rule, and I am convinced that the presence of a strong and independent judiciary, upon which the people may rely to guard individual rights, deserves much of the credit for this good fortune. Freedom is not inherited; it is earned through eternal vigilance. The military is a sentinel in its way, and we in ours.

With that said, I must and do concede that the military is a unique society within a society. The discipline and self-sacrifice that characterize military service have little in common with the liberty and self-interest of civilian life, and rules of constitutional law designed for the latter must sometimes be tailored to the special needs of the military.[3/] Those rules nonetheless apply; they *must* apply.

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

United States v. Robel, 389 U.S. 258, 265 (1967). Aside from cheapening our national values, a broad "military exception" from the Constitution in the interest of defending us from foreign danger could transform the military into a domestic danger. Love of one's own liberty is inborn; love of another's must be learned. Permitting disrespect of constitutional rights

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[3/] *E.g.*, *Brown v. Glines*, 444 U.S. 348, 354 (1980) (permitting restrictions on speech likely to interfere with vital prerequisites to military effectiveness).

to flourish within the military would inevitably cause disrespect of them without it. Consequently, while I will defer, as I ought and must, to the professional judgment of military commanders on things military, I may never defer to their judgment on things constitutional.

I.

It is critical in this case to resist falling into discussion of generalities, as if each homosexual were a clone of some preening archetype. This case is about Lieutenant Paul Thomasson, and only him. The behavior of others is beside the point. Even without the challenged policy, some homosexuals would be unfit for military service, and some among them whose sexual misconduct were the root of their unfitness. The same, of course, can be said for heterosexuals. One need only to read the newspaper to know that the libidos of heterosexual American servicemen are not always restrained by military codes of conduct. But most are.

So, why was Lt. Paul Thomasson discharged?

It was not because of "conduct" in any ordinary sense of the word. To say his service record is "spotless" risks understatement; "sparkling" is a better choice. In his decade in the Navy, Lt. Thomasson rose through the ranks from ensign to full lieutenant. He has excelled in every task assigned him. In April 1991, he was chosen over numerous peers to be an intern to the Joint Chiefs of Staff at the Pentagon. He spent a year there, preparing briefings for Joint Chiefs Chairman Gen. Colin Powell and Secretary of Defense Richard Cheney, and he accompanied them to Congressional hearings on the military budget and force reductions. He was awarded the Joint Service Commendation Medal for "superlative performance" of that role, and, at the end of his internship, Gen. Powell thanked him in a personal letter for

"contribut[ing] immeasurably" to the Joint Chiefs' success. Thomasson closed his career in the service of Rear Admiral Albert Konetzni, who, ironically, was in charge of implementing the policy on homosexuality at issue here; nevertheless, Admiral Konetzni recommended him for immediate promotion to Lieutenant Commander on the very day of his discharge.[4/]

The performance coin has no other side: the Navy does not complain that Thomasson ever rendered middling, let alone deficient, service. Moreover, the Navy has no proof that Thomasson has engaged in sodomy or broken any other conduct rule, high or petty. Conduct cannot be the cause of his discharge.

Likewise, the discharge cannot be explained by Thomasson's homosexual status per se. Under the policy,[5/] homosexuals are expressly permitted to serve.

[4/] The high esteem reflected by this recommendation was nothing new. In 1990, Commander T. M. Feeks noted that Thomasson "routinely out-performs many lieutenant commanders." In 1992, Air Force Brigadier General C. V. Jones of the Joint Chiefs of Staff, who had directly supervised Thomasson during his internship, reported that "he is ready *now* for promotion to Lieutenant Commander." Rear Admiral Alexander Krekich, who shared supervisory responsibilities with Gen. Jones, concurred in this recommendation. Adm. Krekich described Thomasson as "a super star -- one of the Navy's future leaders" and as "the top intern among a group of superlative junior officers." He concluded, "I would *personally* seek out to serve with me again! Outstanding 'Flag lieutenant' & *3* or *4* star material. Groom early." I could go on and on, inasmuch as the effusive tone of this praise pervades Thomasson's entire service record.

[5/] The policy explicitly states that "homosexual orientation is not a bar" to "service entry or continued service." Department of Defense Directive 1332.30 at 2-1 para. C (March 4, 1994).

It is only because he has said that he is homosexual.

There is no difference between being and saying *except* that saying produces a reaction in others. The issue, then, is whether saying, and producing a reaction, is a ground for discharge that may constitutionally be applied to Lt. Thomasson. I believe that it is not.

II.

A classification violates equal protection if effecting an impermissible purpose was *a* (not *the*) motivating factor for the classification, because

> [r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

Private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This rule applies even though the group targeted by the prejudice is not a "suspect" or "quasi-suspect" class for equal protection analysis. *City of Cleburne v. Cleburne Living Center*, 473

U.S. 432, 448 (1985).[6] Consequently, the desire to disadvantage a politically unpopular group is never a legitimate governmental interest. *Id.* at 447; *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

There is a great deal of evidence that the statute was motivated by a desire to accommodate prejudice against homosexuals. In announcing the policy, the President stated that "those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members, but on how nongay service members feel about gays in general and, in particular, those in the military service." Assistant Secretary of Defense Edwin Dorn testified that "much of the resistance to gays is grounded in fear and prejudice." Retired Admiral Thomas Moorer, former Chairman of the Joint Chiefs of Staff, served on an advisory committee during development of the new policy. He was quite blunt about his views: homosexuals engage in "a filthy, disease-ridden practice," are "inherently promiscuous," and have no place in the military. He stated that many other "military people" share his views. Finally, Lt. General John Otjen, who chaired the Military Working Group, stated that "there's a collective sense in the military . . . that homosexuality is wrong." Gen. Otjen believed that all members of the Military Working Group shared this"collective sense." Moreover, he conceded that, but for fear of and prejudice against homosexuals, the policy would be unnecessary.

The evidence that prejudice against homosexuals is a purpose of "don't ask, don't tell" is therefore quite strong.

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[6] It is not necessary, therefore, to decide here whether homosexuals are a suspect or quasi-suspect class.

III.

A.

We are told, though, that tolerating this intolerance is essential to "unit cohesion." Even if accommodating the supposedly widespread disdain for gays were a permissible governmental purpose -- and it is not -- there is no evidence that the discharge of Lt. Thomasson will rationally further that purpose. Indeed, there is only speculation that the discharge of any homosexual would do so.

Dr. Lawrence J. Korb, Assistant Secretary of Defense under President Reagan, offered this critique of the "unit cohesion" rationale:

> There are at least three . . . major problems with the "unit cohesion" argument. First, it represents a severe and somewhat defeatist underestimation of the ability of today's servicemembers to keep their focus on professional military concerns; it also represents a uniquely curious (and, I believe, incorrect) admission that our soldiers and sailors could not effectively follow orders and do their jobs if we lifted the ban. Second, kowtowing to the prejudices of some by excluding others has never been an acceptable policy rationale, either in the military or in our society at large. And third, in the several units where acknowledged homosexuals are serving today (usually, by court order), there are no signs of unit disintegration or bad morale.

General Otjen, while a strong supporter of the "unit cohesion" hypothesis, admitted that it was based on the personal views of members of the Military Working Group rather than hard facts. The lack of real evidence is not for lack of investigating. In 1992, the General Accounting Office

investigated similar organizations that permit open homosexuality in their ranks, and, the next year, the Secretary of Defense commissioned a study of analogous organizations and foreign militaries by the Defense Research Institute of the RAND Corporation. Both studies reported no serious problems resulting from the presence of open homosexuals. *See Able v. United States*, 880 F. Supp. 968, 978 (E.D.N.Y. 1995).

In any event, we have in the record before us a real homosexual, a real unit, and hence a real test of the "unit cohesion" hypothesis. Lieutenant Thomasson served for over fifteen months after admitting his homosexuality. His stellar job performance continued. There were in fact persons in his unit who disapproved of homosexuality, but they continued to do their duty and had no difficulty working with Lt. Thomasson. In fact, some were forced to question their preconceptions in light of Lt. Thomasson's example.[7/] Not a single sailor testified that he had suffered even mildly diminished morale.

7/ The views of Yeoman Third Class John J. Broughton are typical:

> At first [after Thomasson's disclosure], I was shocked and did not know whether or not to back out [of a volunteer assignment to work with Thomasson] and work in my old office. I did not know whether I could work with a homosexual. I decided to stick with the decision I made prior to knowing of LT Thomasson's disclosure. I am glad I did. The knowledge I have gained . . . from LT Thomasson is invaluable. . . . He was always professional towards me. LT Thomasson[,] in my opinion, is the best "LT" in the Navy. . . . His sexual orientation had no adverse effect on myself or to the Navy. With so few good naval officers, the Navy should definitely keep LT PAUL THOMASSON.

B.

The actual experience in Thomasson's unit should not surprise us. The ability of the American soldier to put duty before prejudice has been tested before.

"Unit cohesion" is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs. The concept has therefore been a favorite of those who, through the years, have resisted the irresistible erosion of white male domination of the armed forces. Though the prejudices underlying such resistance have doubtless outlived the erosion, they have not manifested themselves in a loss of "unit cohesion."

Race is the obvious example. "Don't ask, don't tell" was formulated when the chairman of the joint chiefs of staff was a black man, a black man whose presence in the otherwise all-white inner circle of our military caused no apparent friction or decay in its morale, performance, or cohesion. Likewise, I am enough of a realist to know that there are racists serving in our armed forces, racists to whom Gen. Powell's high rank must have been distasteful. They did their duty anyway. Lest the irony escape anyone, consider the opinion of a committee, much like the Military Working Group behind "don't ask, don't tell," that studied the proposed racial integration of the Navy in the 1940s:

> Enlistment for general service implies that the individual may be sent anywhere, -- to any ship or station where he is needed. Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks they work side by side; and in particular tasks such as those of a gun's crew, they form a closely knit, highly coordinated team. How many white men would choose, of their own accord, that their closest

> associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that the answer is "Few, if any," and further believes that if the issue were forced, there would be a lowering of contentment, teamwork and discipline in the service.

Experience is the dread enemy of prejudice, and experience has routed the views of the General Board.

C.

Another incongruity of the "unit cohesion" hypothesis behind "don't tell" is that it encourages lying in the interest of building and maintaining "bonds of trust" among the troops. A relationship built on deception is anything but a "bond of trust." As the court observed in *Able*, 880 F. Supp. at 979,

> [T]he court deems extraordinary . . . the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on unit cohesion of the attempt to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals. Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.
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> * * *
>
> . . . [H]eterosexuals and homosexuals alike would be entitled to think it demeaning and unworthy of a great nation to base a policy on pretense rather than truth.
>
> The sad corollary of this "policy of pretense" is that

moral courage like that displayed by Lt. Thomasson is punished.

IV.

The policy also operates in an unconstitutional manner. Its bedrock is a presumption that *everyone* will fail to comply with rules of conduct -- a declared homosexual is bound to misbehave, and the members of his unit will doubtless allow private prejudice to override discipline. A presumption of misconduct from a person's status, or even from his private prejudices, does not comport with due process.

An analogy offered by Lt. Thomasson at oral argument makes the point well. The Supreme Court has upheld the constitutionality of the military's uniform regulations, notwithstanding that they bar the wearing of yarmulkes. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Now suppose a serviceman writes a letter to his superior stating, "I am an Orthodox Jew." Has he broken the uniform regulations? Of course not. Should he be disciplined or discharged on account of his presumed "propensity" to wear a yarmulke? Of course not. Should he be discharged because his status and accompanying presumed propensity are presumed to stir up anti-Semitism among the majority gentiles? Of course not. In America, we presume that individuals obey the rules until they prove otherwise. If persons do not obey rules with which they disagree, or are presumed to act upon every urge or desire whatever the legal consequences, then rules are a vain exercise indeed.

> [M]ost people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence.

Jacobson v. United States, 503 U.S. 540, 551 (1992). *See also Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious . . . ; the mental element is not simply part of the crime but may constitute all of it.") *Cf. Robel*, 389 U.S. at 423-428 (member of Communist Party could not be presumed to have the specific intent to further its unlawful goals).

V.

The intolerability of a presumption of misconduct from a status renders irrelevant the majority's unremarkable holding that the First Amendment does not bar the evidentiary use of an "admission." Of course it does not. But Thomasson did not "admit" anything that could justify his discharge. He said, "I am gay." Let us take that as admitted. "A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . . ."[8/] Thomasson has not "admitted" any homosexual conduct.

The rejoinder, of course, is that the statute and policy *define* speech as "conduct." This definition fails to withstand constitutional scrutiny, for two reasons. First, as I have already discussed, it impermissibly presumes that homosexuals are unable to obey rules of conduct. Second, it creates a classification *among homosexuals* based *solely* on speech. Because there is no reason even to "rationally speculate"[9/] that declared homosexuals are more likely to break the rules than undeclared -- the opposite speculation seems far more

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[8/] Directive 1332.30, para. C.

[9/] *See Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (stating constitutional minimum for legislative findings underlying a classification).

accurate -- this rule must be targeted at suppressing the speech itself.[10/] Here we meet up with the First Amendment, but on much different ground than the majority tackles it. Suppressing speech is "grave[ ] and most delicate" stuff. The military has a broader power to control speech than a civilian government, *Brown v. Glines*, 444 U.S. 348 (1980), but even there the power is exceedingly narrow: speech may be suppressed only if it is likely to interfere with vital prerequisites to military effectiveness. *Id.* at 354. The "vital prerequisite" here is, I suppose, the accommodation of the prejudices of heterosexual servicemen. I very much doubt that such accommodation -- never a legitimate legislative end -- can ever be a "vital prerequisite" to the military's mission. In any event, Lt. Thomasson has proved beyond any doubt that *his* speech had no deleterious impact at all, let alone to some "vital prerequisite" to military effectiveness. If anything, the expulsion of a fine officer in retaliation for his speech will ultimately prove worse for the Navy.

VI.

Lt. Paul Thomasson has been declared unfit to defend our country based on nothing more than an expression of his state of mind. The expression was not illegal, and the fact admitted is not a ground for discharge. His record of service is superb, and the Navy presented absolutely no evidence that he has violated any military rule of conduct in any way at any time, and absolutely no evidence that his exemplary record is not indicative of his likely future behavior.

Lt. Paul Thomasson's career is over because it is presumed that he will misbehave in a manner that is assumed

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[10/] Hence, the popular label for this prong of the policy -- "don't tell" -- is quite accurate.

to incite the prejudices of his colleagues, whom it is speculated will abandon their duties to defend the United States rather than tolerate him in their midst. There is no proof of any of these hypotheses in the record, and there is abundant disproof. In the final analysis, the *expression* of Lt. Thomasson's *thoughts*, without more, is the cause of his "honorable" banishment from the Navy.

"I think we must let his mind alone."[11/]

I dissent.

Judge Ervin, Judge Michael and Judge Motz join in this dissent.

11/ *American Communications Ass'n v. Douds*, 339 U.S. 382, 444 (1950) (Jackson, J., concurring and dissenting).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LT. PAUL G. THOMASSON,
USN, Plaintiff,

v.

THE HONORABLE WILLIAM J. PERRY,
Secretary of Defense,

and

THE HONORABLE JOHN H. DALTON, Secretary
of the Navy, Defendants.

Civ. A. No. 95-252-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

June 8, 1995.

MEMORANDUM OPINION

HILTON, District Judge.

This matter came before the Court on cross-motions for summary judgment. Plaintiff Lt. Paul G. Thomasson brings this action seeking permanent injunctive and declaratory relief to prevent the Defendants from discharging or otherwise removing him from active duty in the United States Navy as a result of his statement that he is a homosexual. The Plaintiff

maintains that the National Defense Authorization Act for the Fiscal Year 1994, 10 U.S.C. § 654, known colloquially as the "Don't Ask Don't Tell" policy, is unconstitutional on its face and as applied to the Plaintiff in this action. Lt. Thomasson challenges the statute under the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346. Venue lies under 28 U.S.C. § 1391.

BACKGROUND OF THE ACT

On January 29, 1993, Pesident Clinton directed then Secretary of Defense Les Aspin to re-evaluate the Department of Defense's ("DOD's") longstanding policy excluding homosexuals from service in the armed forces. From March through late July, 1993, the Armed Services Committees of the House and Senate held extensive public hearings on the matter. The Committees received testimony from military commanders, gay rights activists, experts in military personnel policy, professors, social scientists, interested civilians and members of the armed forces, and conducted a field visit to Norfolk Naval Complex.[1/] On July 19, 1993, the President announced a new "Policy on Homosexual Conduct in the Armed Forces," which was subsequently enacted in the

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[1/] The Senate held hearings on March 29, and 31, on April 29, on May 7, 10, 11 and on July 20-22, 1993. *See Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services,* 103d Cong., 2d Sess. (1993). The House held hearings on May 4 and 5 and on July 21-23, 1993. *See Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services,* 103d Cong., 1st Sess. (1993); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services,* 103d Cong., 1st Sess. (1993).

National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670-73, *codified at* 10 U.S.C. § 654 (1995). The Act was signed by the President on November 30, 1993. On December 22, 1993, DOD issued implementing Directives, modified slightly on February 28, 1994, and made effective on that date. On the same date, each of the DOD military services issued service-specific instructions to the field implementing the DOD Directives.

Section 571 of the Act sets forth the "Policy concerning homosexuality in the armed forces," which reflects Congress' policy determination made on the basis of the testimony and information garnered from the hearings. This Section contains fifteen findings which recognize, among other things, "military life is fundamentally different from civilian life," and, therefore, its "society includes numerous restrictions on personal behavior that would not be acceptable in civilian society." 10 U.S.C. § 654(a)(8)(B)(1995). Congress also noted that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion." *Id.* The Act concludes that the longstanding exclusion from service in the military of persons who engage in, or demonstrate a propensity to engage in, homosexual conduct continues to be necessary because the presence of such service members "would create an unacceptable risk" to these fundamental components of military capability. *Id.* § 654(a)(15).

Accordingly, the statute provides for mandatory separation from the military if one or more of the following three findings is made:

(1) the member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts; (2) "stated that he or she is a homosexual or bisexual . . . unless [the member] has demonstrated that he or she is not a person

who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," *id.* § 654(b)(2); or (3) "married or attempted to marry a person known to be of the same biological sex." *Id.* § 654(b)(3). As the language of Section 654(b)(2) indicates, and the legislative history confirms, a member's statement that he or she is a homosexual gives rise to a rebuttable presumption that the member engages in, or is likely to engage in, homosexual acts. S. Rep. No. 112, 103d Cong., 1st Sess., at 293-94 (1993), U.S. Code Cong. & Admin. News 1993 at pp. 2080-81.

The implementing Directive applicable to military officers, such as Plaintiff, is DOD Directive 1332.30, captioned "Separation of Regular Commissioned Officers," which the Navy has implemented.[2/] This Directive provides that the military will not ask about an applicant's sexual orientation because homosexual *orientation* "is considered a personal and private matter and is not a bar to continued service . . . unless manifested by homosexual conduct." DOD Dir. 1332.30, Encl. 2, ¶ C, at 2-1 (March 4, 1994). The Directive defines "Homosexual Conduct" as including "homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." *Id.* Under the Directive, "[p]ropensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." *Id.* Although a statement may demonstrate a propensity or intent to engage in homosexual conduct, the Directive provides the service member with an opportunity "to rebut the presumption by

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2/ CNO message 01300Z MAR 94 (NAVADMIN 033/94). *See* 11 Rec. GE10, at 272.

presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Id.* ¶ C.1.b., at 2-2.

The Directive provides explicit guidance to administrative boards when assessing whether an officer has rebutted the presumption. The Directive instructs the boards to consider, among other things,

> (1) Whether the officer has engaged in homosexual acts; (2) The officer's credibility; (3) Testimony from others about the officer's past conduct, character, and credibility; (4) The nature and circumstances of the officer's statement; and (5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

Id. ¶ C.1.b.(1)-(5), at 2-2; *see* 10 U.S.C. § 654(b)(1)(A)-(E).

As the Senate Committee found, the new policy is essentially the same as the pre-1994 policy in that it provides for mandatory separation from the military on the basis of homosexual acts, marriages, or statements indicating a propensity to engage in homosexual conduct. The primary difference is that the DOD will not ask questions about sexual orientation as part of accession processing. The new policy also provides guidance on the conduct of investigations. S. Rep. No. 112, at 289-90, U.S. Code Cong. & Admin. News, at 2076-77.

On March 2, 1994, the day after the Navy implemented the DOD Directives with regard to service by homosexuals, Lt. Thomasson delivered a letter to four Navy admirals for whom he had served at the Bureau of Naval Personnel stating that he was a homosexual. Lt. Thomasson indicated in his

letter that this characteristic was "more deeply rooted than all societal, religious, parental, or peer pressures can effect [sic]." I Rec. Tr., at 4-5. In accordance with military policy, the Navy instituted separation proceedings.

An administrative Board of Inquiry was convened at which Plaintiff was represented by military counsel as well as his current civilian counsel. The Board heard two days of testimony and argument and received into evidence several volumes of materials relating both to Lt. Thomasson's record and the Navy's policy on homosexuality. Lt. Thomasson submitted evidence of his service record, expert testimony regarding the meaning and nature of both homosexuality and the military's policy on homosexuality, and written and live testimony from 15 witnesses with whom he had served and worked over the course of his career. The Navy did not introduce any rebuttal evidence or dispute the substance of any of Lt. Thomasson's evidence. Indeed, during its phase of the proceedings, the Navy acknowledged that Lt. Thomasson had attained an "enviable" service record. I Rec. Tr. at 0036, 0148. The Navy also acknowledged that there was no evidence that Lt. Thomasson had engaged in any "homosexual acts." Plaintiff refused, however, to introduce evidence to rebut the presumption that he engages in or has a propensity to engage in homosexual acts by reading an unsworn statement to the Board, stating: "I will not go further in degrading myself by disproving a charge about sexual conduct that no one has made." I Rec. Tr., at 141, IV Rec. T2A.

After hearing all of the evidence, the Board of Inquiry unanimously voted that Lt. Thomasson had made statements that indicated he "engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts" as prohibited by the policy and that he had not rebutted the presumption raised by those statements, thereby failing to show cause for retention. The Board accordingly

recommended that Lt. Thomasson be honorably discharged.

On September 9, 1994, a three-member Board of Review convened to examine Lt. Thomasson's case. The Board of Review, without comment, unanimously upheld the Board of Inquiry's finding that Lt. Thomasson had failed to establish that he should be retained on active duty, and recommended that he be separated with an honorable discharge. The Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the discharge on January 17, 1994. Lt. Thomasson's honorable discharge certificate has been signed but it has not yet been dated or delivered. On February 27, 1995, Lt. Thomasson filed suit in this Court, seeking declaratory and injunctive relief to prevent his discharge. This Court granted a preliminary injunction enjoining the Navy from any further action pending resolution of this case.

Summary judgment must be entered when "there is no genuine issue as to any material fact" and therefore "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when proof of its existence or non-existence would affect the outcome of the case, and an issue is genuine if a reasonable jury might return a verdict in favor of the non-moving party on the basis of such issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Both parties in the instant action agree that the facts in this case are not in dispute. This action, therefore, is ripe for summary judgment.

THE FIRST AMENDMENT

[1] Lt. Thomasson contends that the policy at issue violates his rights of freedom of speech and association as guaranteed him by the First Amendment, both on its face and as applied to him in particular. The Plaintiff argues that the policy infringes on the First Amendment because it is a

content-based restriction on speech. By making certain statements in and of themselves a sufficient ground for discharge, he contends that the policy is directly aimed at the suppression of free expression—statements that a service member is gay—rather than at any conduct that the military might legitimately regulate.

The Plaintiff, however, misses the fundamental point that the policy uses the speech as evidence, via rebuttable presumption, that the service member's declaration of his homosexuality will lead to homosexual conduct. In the instant matter, the Navy did not, as Plaintiff claims, argue at Lt. Thomasson's discharge hearing that the Board should recommend discharge solely "because Lt. Thomasson's verbal acknowledgement of his sexual orientation was—in and of itself—forbidden 'homosexual conduct.'" Pl's Mem. of P.A. in Supp. of Mot. for Summ. J. at 43. Rather, the Navy argued that Plaintiff's statement gave rise to a presumption that he engages in, or has a propensity or intent to engage in, homosexual acts.

The Supreme Court has recently held in the criminal context that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, ___ U.S. ___, ___, 113 S. Ct. 2194, 2201, 124 L. Ed. 2d 436 (1993). *See also Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 1097, 117 L. Ed. 2d 309 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."). If this holds true in the criminal context, it is certainly applicable in the civil context, where the litigant is not afforded the same constitutional protections as is a criminal defendant. And certainly nothing in the First Amendment bars the use of a statement constituting an

admission. *See Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991) (an "admission [of homosexuality], like most admissions, was made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 655, 121 L.Ed. 581 (1992) (*citing High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 578-80 (9th Cir. 1990)). Although the DOD regulation does affect speech, as the Seventh Circuit recognized, "it does so only incidentally, in the course of pursuing other legitimate goals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989). Indeed, every court of appeals to address this issue under the military's former policy, which contained the same rebuttable presumption, concluded that the use of a statement in this circumstance did not violate the First Amendment. *Pruitt*, 963 F.2d at 1163-64; *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir. 1991); *Ben-Shalom*, 881 F.2d at 458-62; *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228-29 (10th Cir. 1984).

The Plaintiff attempts to distinguish this policy from the pre-1994 policy by arguing that unlike the prior policy, the present policy now means that only homosexuals who speak about their sexual orientation are presumptively unfit for military service. The Plaintiff argues that the policy now concedes that "there is nothing impermissible about being gay and that [because] homosexuals may continue to serve [in the military,] the acknowledgement that one is gay has no conceivable evidentiary value." Pl's Opp. to Def's Mot. for Summ. J. at 34. Again, however, the Plaintiff misreads the policy. Service members who engage in, or demonstrate a propensity to engage in, homosexual conduct are unfit for service under the policy. Statements made by those acknowledging their homosexuality are taken as evidence that the person has, or will in the future, engage in prohibited conduct. But statements are not the only means for discharge.

Those that don't speak about their sexual orientation may still be discharged if it is discovered that they engage in or have a propensity to engage in prohibited conduct. The statute, therefore, does not punish only those homosexuals who speak about their sexual preference.

Lt. Thomasson further argues that the policy implicates the First Amendment and is "particularly pernicious" because it penalizes an individual's honest statements about his personal identity and his affiliation with a particular group. The Court has indicated that a service member's expressive rights must often yield to the necessities of military life. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S. Ct. 1310, 1313-14, 89 L. Ed. 2d 478 (1986) (upholding regulations precluding Orthodox Jew and ordained rabbi from wearing yarmulke while in military uniform); *Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) (upholding restrictions of political speech on military base). As the Supreme Court has recognized, the judiciary's "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507, 106 S. Ct. at 1313. *See also Brown v. Glines*, 444 U.S. 348, 354, 100 S. Ct. 594, 599, 62 L. Ed. 2d 540 (1980) ("Thus, while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'") (*quoting Parker v. Levy*, 417 U.S. 733, 759, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439 (1974)).

In this instance, however, Lt. Thomasson was not discharged from the Navy because of his stated or symbolic expression of an opinion opposing the policy, or because of his support for a group that opposes the policy. Instead, he

was discharged for stating that he was a homosexual and refusing to rebut the presumption that he would thereby engage in homosexual conduct—conduct which the military may validly proscribe. Under the policy, a service member is free to affiliate with a group that opposes the policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual newspapers, or engage in other such expressive activities. *See* DOD Dir. 1332.30, Enc. 8, ¶ C.3.d., at 8-2; S. Rep. No. 112, at 292, U.S. Code Cong. & Admin. News, at 2079. What the service member is not free to do is declare himself to be a homosexual and fail to rebut the entirely reasonable presumption that as a homosexual he will engage in homosexual conduct. *See Ben-Shalom*, 881 F.2d at 464 (holding that a service member's statement indicating a likelihood of homosexual acts "can be rationally and reasonably viewed as reliable evidence" that the service member engages in or is likely to engage in homosexual acts). Thus, the basis for separation is acts and the likelihood of acts, not "speech." *See Pruitt*, 963 F.2d at 1160 (holding that pre-1994 policy does not implicate First Amendment).

It is for these reasons that the policy likewise does not infringe on Lt. Thomasson's right to freedom of association as guaranteed by the First Amendment. The policy is *not* directed, as Plaintiff claims, toward statements of "personal identity," or "affiliation with a particular group," or "a firmly held affiliation with homosexuality." Service members, whatever their sexual orientation, are free to identify themselves as sympathetic to gay rights causes, criticize the policy, and advocate change. Indeed, the policy *expressly* provides that participation in such associational activities in and of itself is not a sufficient basis for discharge. DOD Dir. 1332.30, Encl. 8, ¶ C.3.d, at 8-2. For these reasons, the Court finds that the instant policy does not infringe on the protections afforded Lt. Thomasson under the First

Amendment.

EQUAL PROTECTION

[2] Lt. Thomasson argues that both on its face, and as applied to him in particular, the Defendants' policy regarding service by homosexuals in the military violates the equal protection guarantee of the Fifth Amendment in three ways: (1) by discriminating against homosexuals on the basis of their status as homosexuals; (2) by discriminating against acknowledged (or "open") homosexuals on the basis of their status as open homosexuals and their statements about their status; and (3) by illegitimately and irrationally presuming that open homosexuals, by definition, will violate military codes of conduct.

The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is made binding on the federal government by the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954). Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2, 95 S. Ct. 1225, 1228 n.2, 43 L. Ed. 2d 514 (1975).

In evaluating the Plaintiff's equal protection claim, the Court must first determine which of the three recognized levels of equal protection review to employ: rational review, intermediate scrutiny, or strict scrutiny. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 3254-55, 87 L. Ed. 2d 313 (1985) (describing various standards of review). At the outset, it is important to recognize the particularly limited role of the judiciary in reviewing policies implemented by Congress in the military

arena. Article I, Section 8 of the Constitution provides Congress with exclusive power to raise and support armies. As the Supreme Court has recognized, "judges are not given the task of running the Army, . . . [t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters. . . ." *Orloff v. Willoughby*, 345 U.S. 83, 93-94, 73 S. Ct. 534, 540, 97 L. Ed. 842 (1953).

The issue of what standard of review to apply to equal protection challenges to the military's policy governing service by homosexuals has been addressed previously by five federal courts of appeals. Each court has held that rational basis is the proper standard, whether the challenge involved exclusion because of homosexual acts or based on statements. *See Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (*en banc*); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Ben-Shalom*, 881 F.2d at 464; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003, 110 S. Ct. 1295, 108 L. Ed. 2d 473 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *accord High Tech Gays*, 895 F.2d at 574 (applying rational basis test to challenge by civilian homosexual applicants to Department of Defense security clearance policy). *See also Walmer v. United States DOD*, 52 F.3d 851 (10th Cir. 1995) (reaffirming validity of rational basis review in evaluating equal protection challenges to the military's policy regarding service by homosexuals as previously articulated in *Rich*).

The Plaintiff contends, however, that his claim is subject

to review under strict scrutiny[3/] because the Defendants' policy creates a suspect classification by disadvantaging homosexuals solely on the basis of their sexual orientation and because the policy infringes on the Plaintiff's fundamental right of free speech. As discussed above, the policy does not violate Lt. Thomasson's rights under the First Amendment so application of strict scrutiny on that basis is not appropriate.

The Plaintiff in this action correctly maintains that, while courts must accord deference to the policy determinations made by Congress in the arena of military affairs, there is no "military exception" to the Constitution. Indeed, as Lt. Thomasson points out, "a different equal protection test" does not apply simply because a case arises in the military context. *Rostker v. Goldberg*, 453 U.S. 57, 71, 101 S. Ct. 2646, 2655, 69 L. Ed. 2d 478 (1981). As the Plaintiff acknowledges, however, homosexuals have not been characterized as a "suspect class," which would require the Court to analyze any classification under strict scrutiny.

The Plaintiff argues that this Court should extend the class to include homosexuals because homosexuals constitute a "discrete and insular minorit[y]" under the test articulated by the Supreme Court in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4, 58 S. Ct. 778, 783-84, n.4, 82 L. Ed. 1234 (1938). Because the government is free to

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3/ In the alternative, Lt. Thomasson maintains that the policy is at least subject to intermediate scrutiny because sexual orientation is a phenomenon that is somehow legally akin to gender. Intermediate scrutiny, however, has only been applied to cases involving classifications *based on* gender, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S. Ct. 3331, 3335-36, 73 L. Ed. 2d 1090 (1982), and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S. Ct. 518, 523, 58 L. Ed. 2d 503 (1978). This Court is unwilling to expand the law in that regard based on an oblique theory linking gender and sexual orientation.

criminalize homosexual conduct, however, "a group that is defined by reference to that conduct cannot constitute a 'suspect class.'" *Steffan*, 41 F.3d at 684. *See also Ben-Shalom*, 881 F.2d at 464. Further, the Supreme Court has expressed great "reluctan[ce]" to expand the number of classifications afforded heightened scrutiny. *Cleburne*, 473 U.S. at 441, 105 S. Ct. at 3255. The Court has refused to accord heightened scrutiny to the elderly, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566-67, 49 L. Ed. 2d 520 (1976); the mentally retarded, *Cleburne*, 473 U.S. at 442, 105 S. Ct. at 3255-56; "close relatives," *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 2729, 91 L. Ed. 2d 527 (1986); and a statutorily-defined "family unit," *Bowen v. Gilliard*, 483 U.S. 587, 601-03, 107 S. Ct. 3008, 3017-18, 97 L. Ed. 2d 485 (1987). Therefore, because homosexuals do not constitute a suspect class and the policy does not infringe on the exercise of a fundamental right, analysis of the regulations at issue under strict scrutiny is not appropriate.

[3] The Plaintiff's challenge of the regulations based on the Equal Protection Clause must be examined under the standard of rational review. When evaluating a statute or regulation under rational-basis review, the court must ask two questions: First, are the regulations directed at the achievement of a legitimate governmental purpose and, second, do they rationally further that purpose? *Trimble v. Gordon*, 430 U.S. 762, 766, 97 S. Ct. 1459, 1463, 52 L. Ed. 2d 31 (1977); *Heller v. Doe*, ___ U.S. ___, ___, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993). "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller*, ___ U.S. at ___, 113 S. Ct. at 2642. Under this standard of review, the government "has no obligation to produce evidence to sustain the rationality of a [regulatory] classification." *Id.* at ___, 113 S. Ct. at 2643. Because "a

classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity," *id.*, at ___, 113 S. Ct. at 2642, "'[t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Id.* at ___, 113 S. Ct. at 2643 (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973)).

Moreover, the Plaintiff in an action challenging the validity of a military regulation has an even greater burden to overcome given the deference courts must accord to action by the political branches in the military context. The Supreme Court has recognized that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968). Because the military is, "by necessity, a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743, 94 S. Ct. 2547, 2555, 41 L. Ed. 2d 439 (1974), the Supreme Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed. . . ." *Id.* at 743, 756, 94 S. Ct. at 2555-56, 2561-62. Indeed, "perhaps in no other area has the Court accorded Congress greater deference" than in the military context. *Rostker*, 453 U.S. at 61, 64-65, 101 S. Ct. at 2649-50, 2651-52 (1981).

In addition, the Supreme Court has noted the lack of competence on the part of courts to second-guess decisions made by Congress in the military context. In *Gilligan v. Morgan*, 413 U.S. 1, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) the Court emphatically declared:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Id. at 10, 93 S. Ct. at 2446. The Court has recognized that "'the military must insist upon a respect for duty and a discipline without counterpart in civilian life'" to "foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 507, 106 S. Ct. at 1313 (*quoting Schlesinger v. Councilman*, 420 U.S. 738, 757, 95 S. Ct. 1300, 1312-13, 43 L. Ed. 2d 591 (1975)). *See also* 10 U.S.C. § 654(a)(8)(1995). Restrictions promulgated to achieve these goals are matters entrusted to the military's "considered professional judgment," *Goldman*, 475 U.S. at 508, 106 S. Ct. at 1313, and courts have traditionally recognized that "judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker*, 453 U.S. at 70, 101 S. Ct. at 2654-55.

These principles are particularly pertinent in this matter. Like the regulation at issue in *Rostker v. Goldberg*, where the Court upheld a military regulation requiring the registration of males and not females in the face of an equal protection challenge, this regulation "was extensively considered by Congress in hearings, floor debate, and in committee." 453 U.S. at 72, 101 S. Ct. at 2655. Accordingly, the Supreme Court has cautioned that in making a determination on the merits in this circumstance, a court "must be particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *id.* at 68,

101 S. Ct. at 2653, especially when "Congress specifically considered the question of the Act's constitutionality." *Id.* at 64, 101 S. Ct. at 2651. *See* S. Rep. No. 112, at 284-87, U.S. Code Cong. & Admin. News at 2070-72 (addressing impact of policy on constitutional rights of homosexual service members).

[4] In promulgating the "Don't Ask Don't Tell" policy, the government has clearly articulated a legitimate purpose for excluding persons who engage in or who demonstrate a propensity to engage in homosexual conduct. The military has concluded that allowing acknowledged homosexuals to serve in the military would undermine unit cohesion and military readiness. Congress heard testimony from top military professionals that unit cohesion is the single most important factor in maintaining an effective militia. General Colin Powell, then Chairman of the Joint Chiefs of Staff, testified that "[t]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies." S. Rep. No. 112, at 275, U.S. Code Cong. & Admin. News, at 2061. *See also id.* at 276, U.S. Code Cong. & Admin. News at 2062 (quoting testimony of Dr. William Daryl Henderson, former Commander of the Army Research Institute and author of *Cohesion: The Human Element in Combat* regarding importance of unit cohesion to success in combat). Military professionals testified that unit cohesion must be developed long before the unit is sent to the battlefield or the unit simply will not perform effectively. *See id.* at 275-76, U.S. Code Cong. & Admin. News at 2061-62 (citing testimony of Dr. David Marlowe, Chief of the Department of Military Psychology at the Walter Reed Army Institute of Research and General Colin Powell).

The first reason cited by the government that the presence

of homosexuals in the military undermines unit cohesion focuses on privacy concerns of service members who are required to live in conditions "characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12)(1995). The Senate Committee noted the testimony of several witnesses who stated that permitting persons who engage in, or will likely engage in, homosexual conduct to serve in the military would infringe on the privacy concerns of other service members. Concern for the privacy of service members is clearly legitimate as evidenced by the fact that the military places men and women in different living quarters. As the Senate Armed Forces Committee concluded, "[i]n civilian life, people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military." S. Rep. No. 112, at 281, U.S. Code Cong. & Admin. News, at 2067-68.

Closely related to the military's concern for the privacy of its service members is the concern over introduction of sexual tension into units. The military has determined that sexual tension jeopardizes military readiness. Again, because sexual behavior is a powerful force, the military has provided separate living quarters and assignment policies based on gender. Just as it is reasonable for the military to take sexual behavior and sexual tension into account in establishing gender-based assignment policies, the Senate Committee found it was reasonable for the military to take these considerations into account "when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." *Id.* at 278, U.S. Code Cong. & Admin. News at 2064.

The Plaintiff asserts in Counts II and III that the true purpose of the policy is to exclude homosexuals from the military because of their status as homosexuals, not because

of their conduct. The Plaintiff argues that the government's policy is based on irrational and invidious prejudice and stereotypes and has no empirical basis. Lt. Thomasson maintains, and indeed the government concedes, that his service record is outstanding. He argues that his sexual orientation is of no consequence to his performance and has no impact on unit cohesion. The policy, however, is not based on prejudice but on the military's need to address the legitimate concern that service by homosexuals in the military will adversely impact unit cohesion and military readiness. The Committee noted that these restrictions reflect "professional military judgment as to what categories of personnel contribute to overall combat effectiveness rather than narrow performance criteria related to the performance of a specific task." S. Rep. 112 at 273, U.S. Code Cong. & Admin. News at 2061.

While it is true that some service members may view themselves as homosexuals but nonetheless remain celibate, it would not be rational to develop military personnel policies on the basis that all homosexuals will remain celibate or that they will not be sexually attracted to others. It would be similarly irrational for the military to ignore the obvious implications of placing people who are sexually attracted to each other in the same living quarters. As such, the policy is not based on irrational prejudices but on concrete, articulated concerns about privacy and sexual tension and the resulting impact on unit cohesion. The military is entitled to deference for its professional determination that these legitimate concerns would adversely impact our nation's military readiness.

Under the second prong of rational basis review, the Court must determine whether the means employed by the government are rationally related to the legitimate purpose of excluding those who engage in or demonstrate a propensity to engage in homosexual conduct from service in the military. In

Count III, Lt. Thomasson argues that it is irrational to assume that because a service member makes a statement as to his or her sexual orientation that the member thereby has demonstrated a propensity to engage in prohibited sexual conduct. As the Court of Appeals for the District of Columbia Circuit recently noted in *Steffan v. Perry*, the government's presumption, as embodied in the DOD Directives, that statements as to sexual preference indicate a propensity to engage in sexual conduct is "certainly rational given that the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indication as to the direction of one's drive." *Steffan*, 41 F.3d at 690. Congress recognized that military policies properly take into account the sexual attractions that can exist between men and women, and "[s]imilar considerations apply to the development of policies with respect to homosexuality." S. Rep. No. 112, at 284, U.S. Code Cong. & Admin. News, at 2070. Indeed, advocates of gay rights have themselves linked homosexuality and homosexual acts in arguing against the criminalization of homosexual sodomy.[4/] Further, the DOD need not be "compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts." *Ben-Shalom*, 881 F.2d at 464. Even assuming some homosexuals may state their sexual preference yet not engage in prohibited conduct, when analyzing the constitutionality of a statute under rational basis review, especially in the arena of military affairs, Congress is entitled to deference and this Court is compelled

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[4/] As the Court of Appeals for the District of Columbia pointed out, the Lambda Legal Defense & Education Fund, a well-known gay rights advocacy group, argued in its amicus brief submitted to the Supreme Court in *Bowers v. Hardwick* that homosexual sodomy should not be criminalized because "the 'regulation of same sex behavior constitutes the total prohibition of an entire way of life' since homosexuality is inexorably intertwined with 'homosexual conduct.'" *See Steffan*, 41 F.3d at 690, n.11.

"to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, ___ U.S. at ___, 113 S. Ct. at 2643.

It is asserted that the rebuttable presumption irrationally presumes that homosexuals who acknowledge their homosexuality will violate the law. The Supreme Court, however, has sanctioned the government's use of classifications based on identifiable characteristics as a proxy for conduct when making employment decisions. In *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979), the Court upheld the Transit Authority's refusal to employ methadone users enrolled in a treatment program, finding that it is rational to assume that an addict might engage in unacceptable conduct while on the job. Like the regulation in *Beazer*, the instant regulation is, at bottom, a regulation governing employment in a profession with somewhat unique criteria.

Further, as the D.C. Circuit noted, service members like Lt. Thomasson "who identify themselves as homosexual in a military setting - where a declaration of homosexuality is a ground for discharge - convey the impression that they are not in doubt as to the direction of their sexual drive." *Steffan*, 41 F.3d at 691. This is particularly pertinent in the instant case because Lt. Thomasson refused to state whether or not he intended to engage in homosexual conduct.

In short, the government's use of a rebuttable presumption is an entirely rational means of effectuating the military's legitimate purpose of prohibiting individuals who engage in, or have a propensity to engage in, homosexual conduct from serving in the military. It is not within the province of the Court to second guess the government's decision, or indeed search for other motives or rationales. Rather, the Court, applying a "healthy deference to legislative and executive

judgments in the area of military affairs," *Rostker*, 453 U.S. at 66, 101 S. Ct. at 2652, must simply determine whether the stated purpose is legitimate and the means rationally related to that purpose. In this case, the government has clearly articulated a legitimate purpose and has provided a means that is rationally related to the fulfillment of that purpose.

DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT

Lt. Thomasson contends in Count V that the policy at issue violates his rights to due process and procedural fairness under the Fifth Amendment to the United States Constitution by (1) creating and applying a legal classification that is unconstitutionally overbroad; (2) applying a presumption that is in fact irrebuttable; and (3) imposing an irrebuttable presumption grounded on a class-based expectation. He also contends that the Navy's decision to discharge him was arbitrary, capricious, and unsupported by substantial evidence in violation of the Administrative Procedure Act ("APA").

[5] In contending that the Defendants have created and applied a legal classification that is unconstitutionally overbroad, the Plaintiff presumably means that the policy is overbroad in that it provides for discharge of members who may be homosexual but may not actively engage in prohibited homosexual conduct. The policy, however, provides for discharge of those members who cannot rebut the presumption that they will engage in such conduct based on their statements. The fact that some service members who state that they are homosexuals may have subjective intentions of remaining celibate does not make the statute overbroad. As previously mentioned, under rational basis review, a court is compelled to accept Congress' generalizations "even when there is an imperfect fit between means and ends." *Heller*, ___

U.S. at ___, 113 S. Ct. at 2643.

[6] The Plaintiff's next argument, that the presumption is in fact irrebuttable, is non-meritorious since, as mentioned previously, three service members thus far have been able to rebut the presumption after making statements relating to their homosexuality. Finally, the Plaintiff argues rather obtusely that "it violates due process to impose an irrebuttable presumption, which is rounded on a class-based expectation, on an individual, when that individual may prove an exception to the expected rule and the issue in question plainly calls for an individualized assessment." This policy provides for individualized assessment because the service member is afforded the opportunity to rebut the presumption and is afforded a full hearing on the merits. Again, the military is entitled to rely on reasonable inferences based on classifications to make employment decisions. *See Murgia*, 427 U.S. at 307, 96 S. Ct. at 2562 (holding that mandatory retirement age of 50 for police officers rationally furthers the government's purpose of assuring the physical preparedness of its police force).

It is for this reason that the policy also does not run afoul of the APA. The policy provides, and indeed Lt. Thomasson was given, a full hearing on the merits. There is substantial evidence in the record supporting the Navy's determination that Lt. Thomasson failed to rebut the presumption that he has a propensity to engage in homosexual conduct based on his statement.

Accordingly, the "Don't Ask Don't Tell" policy does not violate Lt. Thomasson's rights under the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, or the APA, either on its face or as applied to him. The Plaintiff's motion for summary judgment, therefore, should be denied and the

Defendant's cross motion for summary judgment should be granted.

An appropriate order shall issue.

ORDER

This matter came before the Court on cross-motions for summary judgment. For reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted and this case is dismissed.

APPENDIX C

DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

IN REPLY REFER TO
1920
Ser 822/2561

From: Chief of Naval Personnel
To: Secretary of the Navy

Subj: LT PAUL G. THOMASSON, USN, 502-64-3008/1310

Ref:
(a) LT Thomasson's ltr of 2 Mar 94
(b) CHNAVPERS ltr 1920 Ser 822/475 of 9 Mar 94
(c) DOD DIRECTIVE 1332.30
(d) CNO WASHINGTON DC 010300Z Mar 94 (NAVADMIN 033/94)
(e) COMNAVDIST Wash DC ltr 1920 Code 04/6213 of 19 Aug 94
(f) BOR Report 1920 Ser 822/2434 of 9 Sep 94
(g) DEPSECDEF Memo of 17 May 94

Encl:
(1) Mr. C. A. Crain's ltr of 21 Jul 94
(2) Honorable discharge certificate

1. Synopsis. LT Thomasson is a regular Line Officer qualified for duty in flying as a pilot with nine years, four months commissioned service. He is presently assigned to the staff of the Bureau of Naval Personnel. He has been recommended for separation from the Naval Service with an Honorable discharge by the Boards of Inquiry and Review

which considered his case.

2. Discussion

a. By reference (a), a letter written and delivered by LT Thomasson to the flag officer in his command stated, "I am gay". Reference (b) notified LT Thomasson that administrative show cause proceedings, per references (c) and (d), had been initiated based on his statement of homosexuality which is defined as homosexual conduct.

b. Reference (e) reported a Board of Inquiry (BOI) considered LT Thomasson's case on 23 and 24 May 1994. The BOI found LT Thomasson did not successfully rebut the presumption, created by his statement of homosexuality, that creates a rebuttable presumption that he engages in, attempts to engage in, has a propensity to engage in, or intends to engage in a homosexual act. The BOI additionally recommended LT Thomasson be separated from the Naval Service with an Honorable discharge.

c. By enclosure (1), LT Thomasson's civilian counsel submitted a rebuttal statement. He states, "on the basis of the facts established on the record and for the reasons set forth in the closing arguments by counsel for the respondent, the reviewing authority should recommend the retention of the respondent." Reference (f) reported the Board of Review upheld the BOI's recommendation. We have considered enclosure (1) and the entire record of this case and concluded LT Thomasson received all the procedural rights to which he is entitled and that his discharge for homosexual conduct is supported in fact and law.

3. Recommendation. Approve the recommendations of the Boards of Inquiry and Review to separate LT Thomasson from the Naval Service with a Honorable discharge. LT

Thomasson, is presently indebted to the U.S. Government for $22,500.00, the balance of his Aviation Continuation Pay. Per reference (g), LT Thomasson's statement that he is a homosexual, though grounds for separation under the current DOD homosexual conduct policy, does not constitute a basis for recoupment. Accordingly, recoupment of the balance of LT Thomasson's Aviation Continuation Pay is not appropriate. Your approval of this letter and signature upon enclosure (2) will effect the recommended action. The separation code will be GRB (homosexual admission).

/s/
H.C. MCKINNEY
Real Admiral, U.S. Navy
Deputy Chief of Naval Personnel

Approved: 13 JAN 1995

/s/
BERNARD ROSTKER
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

APPENDIX D

From: President, Board of Inquiry
To: Commandant, Naval District Wawshington [sic]

Subj: REPORT OF BOARD OF INQUIRY IN THE CASE OF LT PAUL G. THOMASSON, USN

1. Report of Board of Inquiry held at Washington Navy Yard, Bldg. 200, Washington, D.C.:

Date: 23-24 May 1994
Respondent: LT Paul G. Thomasson, USN

2. Findings of the board:

By a vote of __3__ to __0__, the board finds that the Respondent (____ has) (__x__ has not) shown cause for retention.

a) The board specifically finds by a preponderance of the evidence that the Respondent (__x__ has) (____ has not) failed to demonstrate acceptable qualities of leadership required of an officer in his grade as evidenced by statements that he made which are conduct within the meaning of paragraph 3 of CNO Message 010300Z MAR 94 (NAVADMIN 033/94) and the presumption of homosexual conduct thereby raised is not rebutted.

3. Recommendation of the board:

By a vote of __3__ to __0__, the board recommends that the Respondent be:

_____ retained

__x__ separated from the Naval Service, and that the discharge be an HONORABLE DISCHARGE.

/s/

CAPT D.W. ELLERMAN, JR.,
Sr. Mbr

/s/

CAPT MARK A. YOUNG,
Member

/s/

CAPT CLAUDIA L. BAILEY,
Member

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 20, 1995

No. 95-2185
CA-95-252-A

PAUL G. THOMASSON, Lieutenant, United States Navy

Plaintiff - Appellant

v.

WILLIAM J. PERRY, Secretary of Defense; JOHN H. DALTON, Secretary of the Navy

Defendants - Appellees

UNION OF AMERICAN HEBREW CONGREGATIONS; THE AMERICAN JEWISH CONGRESS; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; CENTER FOR WOMEN POLICY STUDIES; NATIONAL LESBIAN AND GAY LAW ASSOCIATION; GAY AND LESBIAN ADVOCATES AND DEFENDERS; AMERICAN CIVIL LIBERTIES UNION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; SERVICEMEMBERS LEGAL DEFENSE NETWORK; IAOMAI, INCORPORATED; FAMILY RESEARCH COUNCIL; IOTA LEGAL DEFENSE FUND

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Following oral argument in this case, a decision was made to seek a poll of the Court on whether to hear this case in banc. The Court voted to rehear this case in banc. This case shall be presented for oral argument for the in banc court at the December session of court, (December 4-8, 1995).

IT IS FURTHER ORDERED that within ten days of the date of this order, twenty (20) additional copies of appellant's brief, twenty (20) additional copies of appellee's brief, twenty (20) additional copies of the appellant's reply brief, and (20) additional copies of all amicus curiae briefs shall be filed in in [sic] office of the Clerk. The appellant will file twenty (20) additional copies of the joint appendix.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX F

THE CONSTITUTION OF THE UNITED STATES

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX G

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

APPENDIX H

NATIONAL DEFENSE AUTHORIZATION ACT OF 1994

10 U.S.C. §654. Policy concerning homosexuality in the armed forces

(a) FINDINGS.--Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the

critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) POLICY.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry

a person known to be of the same biological sex.

(c) ENTRY STANDARDS AND DOCUMENTS.--(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) REQUIRED BRIEFINGS.--The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) RULE OF CONSTRUCTION.--Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) DEFINITIONS.--In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or

intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(Added Pub. L. 103-160, div. A, title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.)

* * * *

IMPLEMENTATION OF SECTION; REGULATIONS; SAVINGS PROVISION; SENSE OF CONGRESS

Section 571(b)-(d) of Pub. L. 103-160 provides that:

"(b) REGULATIONS.--Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

"(c) SAVINGS PROVISION.--Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-marital, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

"(d) SENSE OF CONGRESS.--It is the sense of Congress that--

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for

accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice)."

APPENDIX I

Department of Defense
DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

References: (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)
(b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code
(c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
(d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
(e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"
(f) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)

2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.

3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2. Applies to regular commissioned officers of the Military Services.

3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

[2]

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. The provisions of Enclosure 6 do not apply to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

[3]

b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action.

c. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 28, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 28, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

/s/
Les Aspin

Enclosures - 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

[ENCLOSURE 1]

[1-1]

DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer. W-4.

2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.

4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.

5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.

6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).

7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

8. Homosexual Act

a. Any bodily contact, actively undertaken or passively

permitted, between members of the same sex for the purpose of satisfying sexual desires, and

b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.

9. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

10. Legal Advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.

11. Nonprobationary Commissioned Officer. A commissioned officer other that [sic] a probationary commissioned officer.

12. Probationary Commissioned Officer. A Commissioned officer with less that [sic] 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.

13. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

14. Respondent. A commissioned officer required to show cause for retention on active duty.

15. Separation. Discharge, retirement, or resignation.

16. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

17. Show-Cause Authority. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case [sic] for retention on active duty.

18. Statement that a Member Is a Homosexual or Bisexual or Words to That Effect. Language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[ENCLOSURE 2]

[2-1]

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.

2. Efficiency.

3. Leadership.

4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.

5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by

military or civilian authorities.

2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.

3. Drug abuse.

4. Intentional neglect of, or failure to perform, assigned duties or complete required training.

5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.

6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1.

[2-2]

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer

engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

[2-3]

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the

external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving throughout the proceedings, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b. of this enclosure, above.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in Sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

[ENCLOSURE 3]

[3-1]

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to

the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. Composition. See enclosure 4.

2. Convening. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. Function. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

[3-2]

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the

evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. Determinations

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. Composition. See enclosure 4.

2. Convening. A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. Function. After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. Determinations

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

[3-3]

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.

2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. Retirement. A commissioned officer separated from

active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. Discharge. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.

2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance

of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

[ENCLOSURE 4]

[4-1]

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same

respondent.

[ENCLOSURE 5]

[5-1]

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the

officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. [sic] The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before

the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

[5-2]

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or

her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

[ENCLOSURE 6]

[6-1]

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.

2. That he or she may tender a resignation.

3. That he or she may submit a rebuttal or declination statement instead of a resignation.

4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation,

or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.

2. Discharge.

The action of the Secretary is final.

[ENCLOSURE 7]

[7-1]

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. Consideration. The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. Exceptions

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an

appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

(1) By using force, coercion, or intimidation.

(2) With a person under 16 years of age.

(3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.

(4) Openly in public view.

(5) For compensation.

(6) Aboard a military vessel or aircraft.

(7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

[ENCLOSURE 8]

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GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

5. The guidelines in this enclosure do not apply to activities of Defense Criminal Investigative Organizations and other DoD law enforcement organizations, which are governed by DoD Instruction 5505.8 (reference (f)).

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I

am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

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d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

5. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

C. BASES FOR CONDUCTING INQUIRIES

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

2. A basis for discharge exists if:

a. The member has engaged in a homosexual act.

b. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

c. The member has married or attempted to marry a person of the same sex.

3. Credible information does not exist, for example, when:

a. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or

b. The only information is the opinions of others that a member is homosexual; or

c. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

d. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when:

a. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

b. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in

homosexual acts; or

c. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

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E. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-

finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

E. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.